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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

EDGAR H. SMITH, JR., *Petitioner,*

v.

HOWARD YEAGER, Warden, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Edgar H. Smith, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, affirming the order of the United States District Court for the District of New Jersey denying the writ of habeas corpus.

OPINION BELOW

The opinion of the Court of Appeals, Judge Biggs dissenting, is printed in the Appendix to this petition. (App. 1a). The opinion of the Court of Appeals denying the petition for rehearing, Judge Freedman dissenting, is also printed in the Appendix. (App. 21a).

JURISDICTION

The judgment of the Court of Appeals was entered on January 2, 1968. (App. 25a). The petition for rehearing was denied on March 15, 1968. (App. 26a). On May 15, 1968, Mr. Justice Brennan extended the filing time to and including August 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, under *Massiah* v. *United States,* 377 U.S. 201 (1964), a criminal trial is fatally contaminated by the introduction of a post-indictment admission that a prior transcribed confession was "accurate", when the admission was obtained under deceptive circumstances, in the absence of retained counsel, after petitioner told the police that counsel had advised him not to sign the confession? Whether *Massiah* is applicable to "final" cases, as defined by *Linkletter* v. *Walker,* 381 U.S. 618, 622 at Note 5 (1965)?

2. Under *Townsend* v. *Sain,* 372 U.S. 293 (1963), what standards govern the finding that an evidentiary hearing has been "waived", particularly as applied to statements of counsel made prior to this Court's decision in that case?

3. On the State trial record, was petitioner's confession voluntary?

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and

> to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The First Section of the Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTORY STATEMENT

It "needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist . . . . We must be deaf to all suggestions that a valid appeal to the Constitution . . . comes too late, because courts. including this Court, were not earlier able to enforce what the Constitution demands." *Chessman* v. *Teets,* 354 U.S. 156, 165 (1957). (Harlan, J. for the Court).

Eleven years ago, a New Jersey jury convicted petitioner, Edgar H. Smith, Jr., of the brutal murder of a young girl. Smith is now this country's longest-standing resident of Death Row. In the intervening years, substantial doubts have been raised as to his guilt,[1] see, William F. Buckley, Jr., *The Approaching End of Edgar H. Smith, Jr.,* Esquire Magazine (November, 1965) (Reprinted at App. 27a); post-conviction litigation has been exhaustive, and this Court has denied certiorari three times. 361 U.S. 861 (1959); 376 U.S. 928 (1964) (Douglas, J. dissenting); 379 U.S. 1005 (1965).[2]

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[1] Although guilt or innocence is of no concern to this Court on the merits, serious public doubt about guilt in a capital case should add to the "special and important reasons" for a hearing on the legal issues. Supreme Court Rule 19(1).

No court, however, has ever fully examined the facts of petitioner's police detention that led to and surrounded his incriminating statements. This petition presents the legal questions arising from that setting. It is not "too late . . . to enforce what the Constitution demands." *Cf. e.g., Sheppard* v. *Maxwell, cert. den. sub nom. Sheppard* v *.Ohio,* 352 U.S. 910 (1956); *cert. granted* 382 U.S. 916 (1965), *rev'd.,* 384 U.S. 333 (1966); *Rogers* v. *Richmond, cert. den. sub nom. Rogers* v. *Connecticut,* 351 U.S. 952 (1956), *cert. den.* 357 U.S. 220 (1958), *cert. granted,* 361 U.S. 959 (1960), *rev'd,* 365 U.S. 534 (1961).

STATEMENT OF THE CASE[3]

Facts Brought Out at Trial in 1957

Victoria Zielinski was found dead with a crushed skull in Mahwah, New Jersey on the morning of March 5, 1957 (T. 249-51). That evening at 11:30, after a day's investigation, the police took Edgar H. Smith, Jr., age 23, into custody. (T. 419, 669-70). Through the night and morning, there followed more than thirteen hours of interrogation and other police strategies designed to elicit the Q. and A. statement Smith ultimately gave on the next afternoon. That Q. and A. and a post-indictment admission of its "accuracy" are the incriminating statements that are subject of this petition.

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[2] A full statement of the procedural history appears at Note 1, of Judge Biggs' dissenting opinion. (App. 4a).

[3] The facts are limited to those relevant to the questions presented. Except where otherwise indicated, record references (T.) are to the printed trial testimony lodged with the Clerk of this Court.

Although petitioner was arrested in bed, he had not slept for about 35 hours, from 8:30 on the morning of March 5th until some time after the Q. and A. statement was concluded at 3:45 p.m. the next day. (T. 673). Moreover, Smith had been ill for four days prior to his arrest, (T. 541), and during the 35-hour period he could eat only two eggs and cups of coffee. (T. 673).

During the thirteen-hour period from arrest to the beginning of the Q. and A., Smith was interrogated in relays, by more than a dozen prosecutorial and police officials. (T. 540). There is no evidence that his interrogators gave Smith warnings of any kind. On at least one occasion, the interrogation took place in the presence of newspaper reporters. (T. 420). The weather was cold, and Smith, unjacketed for the most part, shivered from time to time. (T. 540-41). And twice during the night, he was taken from the police station, for substantial but undetermined periods of time, to search for clothes he said he had discarded and to inspect the scene of the crime. (T. 420-35, 478-80, 497-98).

Early on the morning of the 6th, the police took petitioner to a doctor's office, where he was stripped in the presence of the officers and examined. (T. 482-83, 510-11). He was then brought to the prosecutor's office where his limbs were photographed, his nails were cut and scraped; a sample of his hair was pulled; and he was disrobed and garbed in a coverall. (T. 483-85, 499, 523, 671). Interrogation by officers and prosecutors continued throughout (T. 484), and at 10 a.m. Smith broke out crying, admitted that he had been with the girl at the scene, stated that she had hit him and that he had given her a "good shot". (T. 519-23). Thereafter, he spoke with a priest for less than half an hour. (T. 751).

It is noteworthy that at this point, investigation and questioning had already yielded ample evidence for arraignment: the car with a blood-stained mat that petitioner used the night of the crime; his blood-stained shoes, socks, and trousers; and his admission that he was at the scene with the girl and had hit her. (T. 419-22, 477, 484, 499, 502, 505, 508, 601).

Nevertheless, shortly after noon, the interrogators began to elicit the Q. and A. statement. The First Assistant prosecutor conducted the interrogation in the presence of three police officers and one prospective member of the jury venire.[4] (T. 543, 551). The interrogation lasted about three hours. An oath was administered and more than 350 questions were asked. The resulting Q. and A. was admitted in evidence and read by the prosecutor to the jury. (T. 551-593). Petitioner was not arraigned until 7 o'clock that evening, about twenty hours after his arrest.

Two days later, petitioner was indicted. (T. 1). Three days after indictment (*Cf. Massiah* v. *United States,* 377 U.S. 201 (1964)), detective de Lisle visited Smith in jail and asked petitioner to read and sign the 39-page Q. and A. statement. (T. 521). Smith refused to sign the statement on the ground that he had retained a lawyer who had advised him not to sign. (A. 521, 674). Nevertheless, in the face of that refusal, de Lisle elicited from Smith an admission that the statement was "accurate", without informing Smith that his admission would serve in place of his signature to meet New Jersey's requirements for admissibility.

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[4] The prospective juror did not serve on the venire.

At trial, the evil was compounded, for Smith's "accuracy" admission, given without thought that it would have *any* legal significance, took on a new and expanded meaning that virtually guaranteed his conviction. Under New Jersey law, the acknowledgment was required for the admissibility of a prior transcribed confession in order to ensure that the stenographer's transcription was "accurate". *State* v. *Cleveland,* 6 N.J. 316, 327-30 (1951). But at Smith's trial, his admission of "accuracy" was contorted and used for much more than this limited purpose. It was used as evidence that his answers during the Q. and A. were "accurate", i.e., truthful.

Detective de Lisle testified to the "accuracy" admission and was left virtually without cross-examination. (T. 521). The court made *no* inquiry into the voluntariness of the admission, yet it did consider the admission in denying the motion for acquittal. (T. 633). And ultimately, the court charged that the jury could consider the admission in assessing the "weight and credibility" to be given to the prior Q. and A. (T. 963). Since the court also removed the "voluntariness" of the Q. and A. from jury consideration, (T. 963), "weight and credibility" was all the jury had left to determine. In short, Smith's unwitting "accuracy" comment was ultimately presented to the jury as a second confession reaffirming the content of the first.

With respect to the Q. and A. statement itself, some evidence on voluntariness was taken at trial. Four of those present when it was taken, testified *in the presence of the jury* that the questioning was conducted without promises, threats or coercion. (T. 516-18, 527-33. Their testimony, however, was limited to the circumstances of the Q. and A. itself, and thus dealt only with about three of the sixteen hours from arrest to the end of the statement. And these witnesses were left *entirely* without cross-examination.

Initially, defense counsel did not object to the Q. and A. as involuntary. (T. 532). But after he had a chance to read it, he did so. (T. 537). Petitioner then testified outside the presence of the jury. He did not firmly admit or deny voluntariness, although he did testify to the length and continuity of his detention, to the number of his interrogators, to the weather and his chill, to his illness, and to the little food he had eaten. (T. 539-42). The court then ruled the Q. and A. statement voluntary, and ultimately charged the jury that the court had found it so. (T. 545, 963). In deciding that the Q. and A. amounted to an admissible confession, the court relied directly upon the post-indictment "accuracy" admission, though again the court held no hearing as to the voluntariness of that acknowledgment. (T. 549).

Subsequent Proceedings and Factual Allegations

On appeal, the Supreme Court of New Jersey affirmed, expressly treating "the confession as though its introduction had been opposed upon every conceivable legal ground". *State* v. *Smith,* 27 N.J. 433, 457-58 (1958).

In 1959, after further proceedings in the State courts and this Court, petitioner filed a first petition for habeas corpus in the United States District Court.[5] Although *Massiah* v. *United States,* 377 U.S. 201 (1964), was not decided until two years later, the facts relevant to that claim (the post-indictment admission) were before the District Court. The court did not rule upon the admission, however, and without holding an evidentiary hearing,[6] it rejected all other claims that had been exhausted in State courts, including the allegation that the Q. and A. statement was involuntary. 201 F. Supp. 272 (D.N.J. 1962). It is critical to note that both court and counsel dealt with this first petition, prior to *Townsend* v. *Sain,* 372 U.S. 293 (1963), during the reign of *Brown* v. *Allen,* 344 U.S. 443 (1953), which allowed for federal evidentiary hearings, but only under narrowly limited circumstances.

The Court of Appeals for the Third Circuit thereafter affirmed the order denying the first petition. 322 F. 2d 810 (1963). Judge Ganey dissented, however, noting that in view of the evidence already obtained at the time, there was:

> ". . . no reason or motive whatsoever consonant with recognized police work for the detection of crime in the securance of the confession except . . . to compel admission of his guilt." 322 F. 2d at 819.

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[5] Strictly speaking, it was the second petition. The first was dismissed summarily, apparently for prematurity. (App. 4a).

[6] Facts relevant to whether the hearing was "waived" appear in connection with the second question presented at page 2 of this petition.

With respect to the post-indictment acknowledgment, Judge Ganey groped in advance for *Massiah*:

> "... to take this undue advantage of a youth and one unlearned in the law, in spite of his informing the detective of his counsel's advice is a shabby piece of police work this Court should not lend sanction to, or permit to go unchallenged." 322 F. 2d at 819.

After further federal and state court proceedings,[7] petitioner filed his second petition for habeas corpus in July, 1965.[8] The petition and its supplement (A. 3-83) again presented the *Massiah* issue, now by name. Petitioner also requested a *Townsend* v. *Sain* hearing on voluntariness and other issues, in light of facts not explored at trial. (A. 14-21, 58-62). These factual allegations, never tested in any court hearing, are set out in Note 12 of Judge Biggs' dissenting opinion in the court below. (App. 15a-19a). In the words of Judge Biggs, if the allegations set out be

> "contrasted with the evidence given by the witnesses at the inquiry by the Bergen County Trial Court into the voluntariness of Smith's incriminating statement, it will be observed how comparatively little evidence that Court had before it relating to the period between the time when Smith was first taken into custody by the police and the time when he gave his incriminating statement. But the period of time referred to is of vital significance in ascertaining the voluntariness of Smith's statement." (App. 14a, 15a).

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[7] See Note 1 of Judge Biggs' dissent. (App. 4a).

[8] Record references (A.) are to the Appellant's Appendix filed in the United States Court of Appeals for the Third Circuit.

Nevertheless, although no District Court had ever considered a Smith petition during the new reign of *Townsend* v. *Sain,* the court did not hold a *Townsend* hearing. Instead it denied this petition summarily upon the ground that *Johnson* v. *New Jersey,* 384 U.S. 719 (1966), precluded retroactive application of *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) and *Miranda* v. *Arizona,* 384 U.S. 436 (1966). (A. 85). The order did not mention the applicability of *Johnson* to *Massiah,* but the court subsequently denied an Application for Reconsideration which highlighted that point. (A. 86-95, 114). On appeal, the United States Court of Appeals affirmed *per curiam,* again omitting mention of *Massiah.* With respect to the *Townsend* hearing, the court held that, although *Townsend* had not been decided when the first habeas petition was pending before the District Court, the case had been presented to the Third Circuit after argument of the first appeal. Accordingly, the court concluded, *Townsend* and all other issues had been disposed of on the appeal from the denial of the first habeas petition. (App. 2a).

Judge Biggs dissented, suggesting that since *Townsend* had expanded the availability of federal habeas hearings, and was not the law available on the first petition, there was no waiver of the *Townsend* hearing. Such a hearing was now required to settle the voluntariness, *Massiah,* and other questions properly presented. (App. 19a). Judge Freedman expanded upon these views in a lengthy dissent from the denial of the petition for rehearing *en banc.* (App. 21a-24a).

Accordingly, unless this Court acts, Edgar Smith may be executed without any court ever having spoken to *Massiah* on the merits, or heard the facts surrounding the incriminating statements that convicted him.

REASONS FOR GRANTING THE WRIT

1. MASSIAH AND THE POST-INDICTMENT ADMISSION.

The Court should summarily reverse the judgment below in light of *Massiah* v. *United States,* 377 U.S. 201 (1964) and *McLeod* v. *Ohio,* 381 U.S. 356 (1965). Like petitioners Massiah and McLeod, Edgar Smith

> "was denied the basic protection of [the Sixth Amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which . . . agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206.

The "incriminating words" elicited were Smith's post-indictment admission of the "accuracy" of the prior Q. and A. These words were elicited by a detective who was told by Smith that his absent lawyer had warned him against signing the confession, and who must also have known that the admission was as good as a signature for admissibility purposes. *State* v. *Cleveland,* 6 N.J. 316 (1951).

The accuracy admission had particular impact in this case, because of the treatment the trial judge gave to the prior Q. and A. Using a procedure now discarded even in New Jersey[9] the trial judge not only made a conclusive finding of voluntariness, but he informed the jury of that finding and explicitly left only "weight and credibility" open for jury consideration. He then charged the jury that in determining the weight and credibility of the Q. and A.:

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[9] *State* v. *(Clarence) Smith,* 32 N.J. 501 (1960), warned trial judges not to inform juries of their findings of "voluntariness".

> "You take into consideration . . . the testimony of the detective that the defendant read it once and acknowledged its accuracy." (T. 963).

In truth, then, from the jury's point of view, Smith's post-indictment admission was among the most damaging statements he made.[10]

But just as the "accuracy" admission led to conviction, so it must lead to reversal, for it was elicited in violation of Smith's Sixth Amendment post-indictment right to counsel. The *Massiah* case later made that violation explicit, but as the Court noted, the *Massiah* rule "no more than reflects a constitutional principle established as long ago as *Powell* v. *Alabama*" in 1932. 377 U.S. at 205. The *Powell* principle, 287 U.S. 45, 57 (1932), as quoted in *Massiah* and violated here, is that:

> "'during perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants . . . [are] as much entitled to such aid [of counsel] during that period as at the trial itself." 377 U.S. at 205.

In view of the respectable age of the principle reiterated in *Massiah*, it is no wonder that this Court has accorded that Sixth Amendment rule the retroactivity denied to the Fifth Amendment rules of *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) and *Miranda* v. *Arizona,* 384 U.S. 436 (1966). See *Johnson* v. *New Jersey,* 384 U.S. 719 (1966). Thus, in *McLeod* v. *Ohio, supra,* this Court summarily reversed a conviction that rested upon a post-indictment statement taken in violation of *Massiah,* even though both McLeod's statement and his trial took place before *Massiah* was decided. If *Johnson's* retroactivity bar were applicable to *Massiah,* as it is to *Escobedo* and *Miranda,* the *McLeod* conviction would have [redacted] survived.[11]

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[10] Although there was no trial objection to de Lisle's testimony concerning the admission that is no bar to application of *Massiah*. This Court has only recently reversed a conviction, in a case tried after *Massiah*, in which no objection was made. *Beatty* v. *United States*, 389 U.S. 45 (1967); see *Beatty* v. *United States*, 377 F. 2d 181, 183, 193 (1967).

In other words, this Court has already given *Massiah* the retroactive effect to non-"final" cases accorded to the *Mapp* rule in *Linkletter* v. *Walker,* 381 U.S. 618, 622 at Note 5 (1965). Admittedly, *Linkletter* denied full retroactive effect to *Mapp* but the reasons for that limitation are inapplicable to *Massiah*:[12]

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[11] *McLeod* also makes clear that the *Massiah* rule is enforceable against the States, and that surreptitiousness in eliciting post-indictment statements is not critical to the holding in *Massiah*. In *McLeod,* the statements were knowingly made to a police officer. Even if trickery were required, however, there is more than a suggestion of it here. See text at pp. 6, 7.

[12] The ensuing analysis in the text follows the balancing test set up in *Johnson* v. *New Jersey,* 384 U.S. at 728:

> "We also stress that the retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, *and the way in which these factors combine must inevitably vary with the dictate involved. Accordingly as Linkletter and Tehan suggest, we must determine retroactivity 'in each case' by looking to the peculiar traits of the specific 'rule in question'.*" (Emphasis supplied).

a. Reliance

The first *Linkletter* reason for limiting retroactivity was the justifiable reliance States had placed upon the *Wolf* case, overruled in *Mapp*. *Massiah,* however, did not overrule any decision. Indeed, the Court explicitly stated that *Massiah* "no more than reflects" the *Powell* principle, then of 32 years standing.

b. Purpose of the Rule—Reliability of the Statement

Unlike the police deterrent purpose of *Mapp,* or the purpose in *Escobedo* and *Miranda,* "to guarantee full effectuation of the privilege against self-incrimination", *Johnson* v. *New Jersey, supra,* at 729, the purpose of the *Massiah* rule is reflected in its reliance upon the *Powell* case and the Sixth Amendment: to ensure "effective representation by counsel at the only stage when legal aid and advice would help" the defendant. 377 U.S. 204. As in other Sixth Amendment cases (See, e.g., *Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Doughty* v. *Maxwell,* 376 U.S. 202 (1964); *Hamilton* v *Alabama,* 368 U.S. 52 (1960); *Mempa* v. *Rhay,* 389 U.S. 128 (1967)), full retroactive effect should be given to *Massiah* upon the Court's established criterion—that the absence of counsel threatens "the very integrity of the fact-finding process" and presents "the clear danger of convicting the innocent." See *Johnson* v. *New Jersey, supra,* at 728.

Indeed, those evils come to pass here, for in the absence of counsel, petitioner, who refused to sign on advice of counsel, was led into an acknowledgement that his Q. and A. was "accurate", wholly unaware that his acknowledgment would serve in place of his signature for admissibility purposes. And, most significantly, without counsel, he had no way of knowing that his casual comment on "accuracy" would later be used, not merely to substantiate the stenographer's transcription, but to increase dramatically the "weight and credibility" the jury would give to the prior Q. and A.[13] Under these deceptive circumstances, there can be no doubt that the *Massiah* violation undermined the "reliability" of the statement elicited, impaired the "integrity of the fact-finding process" and created "the danger of convicting the innocent." At least in such circumstances, retroactive application is required.

c. Impact on Administration of Justice

The final *Linkletter* reason was that unlimited retroactivity would work serious disruption in the administration of justice. In view of the *Wolf* rule, it was easy to predict that multitudes of cases would be affected if *Mapp* were fully retroactive. Full retroactivity for *Massiah* rule, however, presents no such threat. That rule involves only post-indictment questioning in the absence of counsel—a rare phenomenon, as contrasted with the pre-indictment settings of *Escobedo* and *Miranda*. Questioning is valid when used to identify and develop a preliminary case against a suspect. After indictment, its legitimate function is extinct. Accordingly, unless gross misbehavior be attributed to police everywhere, it must be assumed that violations of *Massiah* have rarely taken place.

More than assumption supports that conclusion. It is some index of rarity that in the four years since *Massiah* was decided, less than ten reported cases, state and federal, have presented *Massiah* claims in a "final" context within the meaning of *Linkletter*.[14] Consequently, the evidence strongly suggests that, in the particular instance of *Massiah's* retroactivity, the fear of impending disruption is no more than a specter. Our legal system should, by contrast, require compelling proof of an overriding evil before relying upon that evil to deny application of constitutional principles.

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[13] Counsel's presence also would have helped to guarantee that the statement of "accuracy" was itself accurately reported at trial. There was trial conflict on that point. (Cf. T. 521 with T. 674-75).

Accordingly, the *McLeod* reversal compels similar treatment here, for there are no countervailing *Linkletter* interests, either in terms of reliance or disruption, to justify the *Linkletter* limitation upon the retroactivity already accorded to *Massiah*.[15] Since this Court has completely considered retroactivity principles in *Linkletter* and subsequent cases,[16] the judgment below should be reversed summarily. If the issue be regarded as still unsettled, however, it is plainly of sufficient importance to warrant oral argument in this Court.

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[14] Research encompassed all State and Federal jurisdictions through cases reported in May, 1968. Only seven cases were found in which an allegation was made, in a "final" setting, that a post-indictment statement was elicited by the government in the absence of counsel. Since research of this sort is bound to overlook cases, the text reports the results as "less than ten".

The seven cases found are: *Lyles* v. *Beto*, 379 U.S. 648 (1965); *Romano* v. *Fay*, 360 F. 2d 389 (2nd Cir. 1966); *Lopez* v. *Pitchess*, 265 F. Supp. 136 (C.D. Cal. 1967); *Ex Parte Newell*, 394 S.W. 2d 175 (1965) (Tex.); *Elliot* v. *Warden*, 243 Md. 637 (1966); *Commonwealth* v. *Coyle*, 427 Pa. 72 (1967); *Raymond* v. *Rundle*, 427 Pa. 313 (1967).

[15] In *Lyles* v. *Beto*, 379 U.S. 648 (1965), this Court vacated the judgment and remanded a case that called for a fully retroactive application of *Massiah*. Presumably, *Lyles* was remanded because the Court of Appeals had decided it prior to *Massiah* and thus had no opportunity to apply *Massiah* itself. See 329 F. 2d 332 (5th Cir. 1964). On remand, the Court of Appeals held that *Johnson* governed *Massiah* and thus barred retroactive application. 363 F. 2d 503 (5th Cir. 1966). The Court failed to note the existence of *McLeod*, however, which would have alerted it to the inapplicability of *Johnson*. But no petition for certiorari was filed.

[16] See *Tehan* v. *Shott*, 382 U.S. 406 (1966); *Johnson* v. *New Jersey*, *supra*; *Stovall* v. *Denno*, 388 U.S. 293 (1967).

2. THE TOWNSEND v. SAIN "WAIVER".

No court has ever fully heard the facts of Edgar Smith's police detention that led to and surrounded his Q. and A. confession and post-indictment "accuracy" affirmation. His second habeas petition and supplement, involved here, called for such a hearing under *Townsend* v. *Sain,* 372 U.S. 293 (1963). (A. 4, 61). No hearing was held, however, and that denial was upheld in the Third Circuit upon a theory of "waiver" repugnant to this Court's teachings.

At the outset, it should be made clear that the events relied upon for the "waiver" took place, not in connection with this second habeas application, but in the District Court upon the first petition when *Townsend* v. *Sain* had not yet been decided. *Brown* v. *Allen,* 344 U.S. 443 (1953), which *Townsend* was later to "supersede," 372 U.S. at 312, was thus the law on the availability of federal evidentiary hearings. Under *Brown* a hearing was possible only under "uncommon circumstances". 344 U.S. at 497. At the time of the alleged "waiver", then, neither counsel nor the court regarded a hearing as "mandatory" upon the six criteria later to be laid out in *Townsend.* 372 U.S. at 313. Likewise both were unaware of the broad "discretion" that *Townsend* was to confer upon the district judge.

> "In every case he has the power constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim." 372 U.S. at 318.

The factual setting needs clarification as well. The remarks of the district judge relied upon by the Third Circuit are printed in the opinion of that court so close to the remarks of counsel that it may seem as though they are parts of verbal interchange. (App. 2a-3a). In fact, the court's remarks were made on May 15, 1961. (App. 64a, 65a). Counsel's remarks were made on June 5, 1961. (App. 67a, 69a). Moreover, there is no indication whatever that counsel was responding to the court's statement made three weeks earlier.

Neither is there any clear indication that the Court's comment on May 15 was an "offer" of an evidentiary hearing.

> "THE COURT: 'Let me say this, There may have been some misunderstanding on our last discussion, but it was my thought, and I think I initiated the idea that I didn't want counsel on the side of the defendant, or the side of the state or anybody involved in this case feeling dissatisfied with the state of the record; that I wanted this record to be as complete as you thought it should be. . . . I just wanted everybody to be satisfied that they had, so far as they were concerned, this record in complete form so that here and later and wherever you may go, whoever takes the initiative of going from here to somewhere else would not be called upon to argue that this is incomplete and this matter really hasn't been heard as yet.' "

Although these words reflect the court's concern for the "state of the record", the full context discloses that the court's concern was focused upon the completeness of the petitioning papers, and not at all upon the question of an evidentiary hearing. As the parts of the transcript reprinted in the Appendix (App. 64a-67a) show,[17] there was no explicit discussion of an evidentiary hearing. Instead the colloquy was directed to whether the case would proceed upon the original petition for habeas corpus, a supplemental petition allowed by the judge when he was assigned to the case, or both documents. Indeed, the court clarified the context in a remark that follows immediately upon the foregoing quotation:

> "[The Court]: Now that was my notion, and that is the (4) reason I think I suggested that I would allow an amended or supplemental petition, you see." (App. 65a)

Three weeks later, petitioner's counsel made the second comment quoted in the opinion below as completing the "waiver":

> "The United States Supreme Court says your Honor may hold a hearing de novo if need be to go into the historical facts behind this case. I don't think it is necessary here. I think if your Honor limits himself to the record, I think that the error, the fundamental constitutional error in this case is so overwhelming that I need not stand here and argue this case at any great length.
>
> "Now, if we understand each other, so there will be no mistake about it, we rely solely and wholly upon this amendment and supplemental petition your Honor now has before you with the exceptions that I noted at my last appearance of Exhibit C attached to the original petition, which is the excerpts of the statutes . . . With that addition, I say we rely solely upon this amended and supplemental petition . . ."

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[17] The full transcript is also part of the record. It appears in the Appellant's Appendix in the Third Circuit. (A. 121-180).

Again, the transcript of June 5 discloses that there was no "offer" of a hearing by the court. (App. 67a-69a). At most, the foregoing remark was a gratuitous addition to counsel's argument that the constitutional violation was clear.

Moreover, still later at the June 5 hearing, petitioner's counsel said:

> "Now there is one other point I would like to bring in. Mr. Brudnick still says we are restricted to this trial record. I say we are not, and I say the Rogers case now agrees with us that this Court can go beyond the trial record and it says it very plain here. As a matter of fact, the Rogers case says even if we didn't raise the voluntariness of the confession in the trial court, we can raise it here for the first time and your Honor can hold a de novo proceeding on that assuming for the sake of argument that the lawyer failed to raise the issue of voluntariness in the trial court." (App. 69a-70a).

Arguably these remarks constituted a *request* for an evidentiary hearing, but at the very least they are inconsistent with the view that petitioner's counsel had "waived" such a hearing earlier.

Accordingly, there is no factual basis for the "waiver" found by the court below. But, there is also no legal basis for that conclusion, for even if counsel "waived" something at the first habeas hearing, he could not have waived *the right to a hearing that is at stake here.* That right did not exist until *Townsend* v. *Sain* gave it life, months after the alleged "waiver." It is true that a hearing was possible under the *Brown* case, but *Townsend* so radically expanded its availability, on "mandatory" as well as "discretionary" bases, that the actions of counsel in the pre-*Townsend* era cannot fairly bind petitioner now. In other words, at the time of the alleged waiver, the expanded right to a hearing was simply not "known" within the "classic definition of waiver . . . . 'an intentional relinquishment or abandonment of a *known* right or privilege' . . . ." (Emphasis supplied). *Fay* v. *Noia,* 372 U.S. 391, 439 (1963)

Likewise any waiver in the first proceeding cannot bind petitioner now, for his second petition presents new and substantial "voluntariness" allegations.[18] During the reign of *Brown* v. *Allen* it could properly have been believed that such allegations would not have warranted a hearing. But with the advent of *Townsend* it became fitting to present details well beyond the state court record, for they bear directly upon the "adequacy" of that record—one criterion for a "mandatory" hearing. Moreover, *Townsend* inspires the presentation of details that may persuade a court to exercise its new-found "discretion" to hold a hearing in any case.

But such detailed allegations were not before petitioner's first habeas court, which in any event had a pre-*Townsend* view of its hearing power. Likewise, they were not before the Third Circuit on the first appeal.

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[18] E.g., that he was forced to strip by two detectives who taunted him and knocked him down; that he was told his wife was being held and would be released only when he "talked". The second habeas petition (1965) contains the full set of allegations. See dissenting opinion of Biggs, J. at Note 12. (App. 15a-19a). But many have been advanced, at least in outline, by Smith since 1959. Moreover, allegations pertaining to police interference, both with access to his wife and to counsel, have consistently been urged before cases such as *Haynes* v. *Washington,* 373 U.S. 503 (1963) and *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) highlighted their legal significance.

Consequently, even though that court had available the intervening *Townsend* case, this Court must reject the argument that the *Townsend* issue was disposed of on the first appeal. For, on that appeal, the Third Circuit had before it a petition "inspired" by *Brown* v. *Allen.* Moreover, Townsend addresses itself to the specialized expertise of district judges. It is not for Courts of Appeal to exercise "discretion" in the first instance.

Finally, Smith cannot be bound by the actions of counsel because even if a "waiver" could be wrung from these facts, there is no evidence that it was "the considered choice of the petitioner". *Fay* v. *Noia*, 372 U.S. at 439. In capital cases, this rule should be strictly enforced, for it is intolerable that one man may "waive" away the life of another. In this case, any doubt concerning petitioner's participation can be resolved as a threshold matter in a *Townsend* hearing.[19]

Since such a hearing is plainly appropriate on the allegations of the present habeas application, the judgment below should be summarily reversed. A hearing is required because, as Judge Biggs noted below, if the allegations of the present application be "contrasted with the evidence given by the witnesses at the inquiry by the Bergen County Trial Court . . . . it will be observed how comparatively little evidence that Court had before it" on the issue of voluntariness. (App. 14a). This case thereby calls for a "mandatory" hearing within the fifth *Townsend* category—where "the material facts were not adequately developed at the state-court hearing." 372 U.S. at 313.

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[19] Petitioner has never left Death Row and so was not present at the proceeding in question. The Third Circuit denied petitioner's application to expand the record with an affidavit disclaiming his knowledge that any hearing was waived. That denial may have amounted to a denial of due process in this case, because the waiver issue did not appear until after the District Court denied the petition. In a conversation, the judge informed counsel that he had decided the *Townsend* claim on that ground. But since counsel had no opportunity to contest the facts of the alleged waiver, the Court of Appeals should have permitted the affidavit and remanded for a factual hearing on the question.

It is true that some voluntariness hearing was held at trial. But the fifth *Townsend* category was explicitly designed for just that situation. That category was not meant to encompass only "newly discovered evidence," for *Townsend's* fourth category explicitly covers that. 372 U.S. 313. Indeed, *Townsend* compels a federal hearing if "for any reason not attributable to the inexcusable neglect of petitioner, ... evidence crucial to the adequate consideration of a constitutional claim was not developed at the state hearing . . . ." 372 U.S. 317.

No allegation of "inexcusable neglect" can be substantiated on this record. In *Townsend,* this Court equated "inexcusable neglect" with the "deliberate bypassing of state procedures" as defined in *Fay* v. *Noia.* And *Noia* makes clear that such a conclusion may be reached "only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default." 372 U.S. at 439. No such inquiry appears on this record, although at a subsequent *Townsend* hearing the State could attempt the relevant showing.

Likewise, the State could attempt to show that the failure to develop the facts fully at trial was a "tactical" decision sufficient to constitute a default. It is virtually inconceivable, however, that the failure was a "tactical" choice. A decision not to raise "voluntariness" at all might have been designed as litigation strategy, but what conceivable reason would have warranted only partial development of the facts? It is much more likely that this was a case in which counsel "failed because of insufficient preparation or other neglect to marshall all crucial evidence underlying a federal claim . . . ." In that situation, "a knowing default should not be found, although counsel may have been aware both of the right at stake and of the applicable rule."[20] Sofaer and Wright, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility,* 75 Yale L.J. 895, 971.

Evidence of counsel's inadequate preparation is already on the state court record. Counsel did not initially object on voluntariness grounds. Only after reading the Q. and A. in the midst of trial did he prompt such a hearing. And even then, he left the State's witnesses without cross-examination.

The court, too, contributed to the inadequacy of the hearing. Four of the State witnesses on "voluntariness" were examined *in the presence of the jury,* a technique that may well have inhibited defense inquiry. Such a procedure has now been declared unconstitutional. *Sims* v. *Georgia,* 385 U.S. 538 (1967).

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[20] The Harvard Law Review agrees: "Thus it would seem that defense counsel's failure adequately to press a constitutional claim might be a ground for disregarding a state court determination even if it was not so serious as to amount to a denial of the defendant's right to effective assistance of counsel." Note, *State Criminal Procedure and Federal Habeas Corpus,* 80 Harv. L. Rev. 422, 425.

Accordingly, the voluntariness hearing held at trial was plainly "inadequate" and *Townsend* v. *Sain* thereby calls for a new one.[21]

3. THE Q. AND A. CONFESSION WAS INVOLUNTARY.

Examining only the state court trial record, the decisions of this Court compel the finding that Edgar Smith's Q. and A. confession was involuntary.

The Court's most recent precedent, *Greenwald* v. *Wisconsin,* 390 U.S. 519 (1968) presents a compelling analogy. Both Smith and Greenwald were arrested after 10 p.m. one evening, detained through the night, and confessed early the next afternoon. Neither had eaten since early on the day of the arrest. Indeed, Smith had not taken food since the morning, whereas Greenwald had eaten at 4 p.m. Both Smith and Greenwald went without sleep during detention, although Greenwald, but not Smith, was left alone for much of the night and thus had an opportunity to sleep.

Like Greenwald, Smith was ill during the interrogation period and both were transferred from one detention site to another. Early in the morning, Greenwald was exposed to a "lineup"; and Smith, to a medical examination. Both suspects were subject to intermittent questioning by several officers at a time.

Apart from these similarities, Smith's case is even more compelling. His periods of questioning were longer. Unlike Greenwald, he was never advised of his

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[21] At the new hearing, it would also be appropriate to raise the other claims that have not yet been adjudicated in federal habeas, see Judge Freedman's dissent below, as well as claims suggested by recent decisions of this Court, e.g., *Witherspoon* v. *Illinois,* 20 L. Ed. 776 (1968) that cannot properly be decided upon this record.

	I. Denial of Rights					II. Questioning								III. Threats		IV. Status of Accused						V. Nature of Coercion											VI. Second confession	VII. Special Techniques		VIII. Previous experience with police (criminal record)
	Deprivation of friend, relative or counsel (incommunicado)	No prompt preliminary hearing	Not informed of rights	Statement after indictment	Requested lawyer	Extended questioning	Where questioned	Relay questioning	Night (early morning) questioning	No. of interrogators	Questioning by psychiatrist	Friend or relative assists in questioning	Confession prepared by police	Threat of harm or loss	Threats to others	Youth of accused	Education of accused	Intelligence of accused	Language barrier	Insanity	Sickness of accused	Physical torture	Fear of mob violence	Protracted detention	Denial of sleep	Slapping	Illegal police procedure	Stripped of clothing	Denial of food	Confinement facilities	Promise of leniency	Accused placed in "show-up"		Use of truth serum	Use of lie detector	
Smith	x	x	x	x	#	x	x	x	x	x					#						x			x	x		#	x	x							
Escobedo	x		x																x								x									x
Jackson									x												x												x	x		
Massiah				x																																
Haynes	x		x		x													x						x									x			x
Lynumn														x																	x					x
Townsend																x	x				x													x		
Gallegos	x					x										x																	x			
Culombe	x	x	x		x				x			x					x	x						x												
Reck	x				x	x										x	x	x			x			x					x			x	x			x
Rogers	x				x				x						x												x						x			
Blackburn	x					x	x			x			x							x																
Spano	x			x	x	x			x	x		x																								x
Payne	x	x	x														x	x					x						x						x	
Fikes	x	x					x										x	x																		x
Leyra									x		x														x								x			
Harris			x			x	x								x		x																			
Turner	x	x	x			x		x	x															x			x									
Watts	x	x	x			x		x	x															x	x		x		x	x					x	
Lee														x		x																				
Haley	x					x		x	x							x																				
Malinski	x													x													x	x					x			
Ashcraft	x					x		x	x																x											
White	x						x										x							x												
Chambers	x					x			x														x							x						
Brown													x									x														

x = Facts From State Court Record

# = Allegations Added

rights and never testified that he knew of them. And unlike Greenwald, Smith, seven years younger, was "a stranger to the criminal law." 390 U.S. at 521.

Upon such a comparison, it would be plain injustice for this Court to permit Smith's confession to stand. Moreover, the accompanying chart compares the factors present in this case with those in other confession cases reversed by this tribunal.[22] That comparison, too, compels the conclusion that the judgment below must be reversed.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for a writ of certiorari should be granted.

EDWARD BENNETT WILLIAMS
STEVEN M. UMIN
1000 Hill Building
Washington, D. C. 20006
Counsel for Petitioner

Of Counsel:

STEPHEN F. LICHTENSTEIN
505 Broad Street Bank Building
Trenton, New Jersey 08608

August 12, 1968

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[22] The chart is a modified version of one appearing in the *Defender Newsletter*, Vol. II, No. 5, September, 1965.

APPENDIX

OPINIONS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16128

UNITED STATES OF AMERICA EX REL.
EDGAR H. SMITH, *Appellant*,

v.

HOWARD YEAGER, Warden, New Jersey State Prison
at Trenton

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued May 4, 1967

Before STALEY, *Chief Judge*, BIGGS and
HASTIE, *Circuit Judges.*

Opinion of the Court

(Filed January 2, 1968)

PER CURIAM.

This is an appeal from the denial of appellant's writ of habeas corpus by the United States District Court for the District of New Jersey. This court fully considered all the points now raised by appellant on the occasion of his first appeal to this court, United States ex rel. Smith v.

New Jersey, 322 F.2d 810 (C.A.3, 1963), and we consider that opinion dispositive.

Appellant, however, urges that his rights must now be considered in the light of Townsend v. Sain, 372 U.S. 293 (1963). The short answer to this contention is that the entire court considered this proposition on the first appeal. Townsend v. Sain was decided after the argument on Smith's first appeal, but before the case was decided and before the denial of Smith's petition for rehearing en banc by the majority of the entire court. Indeed, one of Smith's bases for requesting rehearing en banc was that Townsend v. Sain required this court to remand the case for a plenary hearing, and Smith's petition recites that "When Townsend v. Sain was decided, after the oral argument of this case, counsel advised this court by letter that appellant would rely on that case with regard to his right to a full hearing." Thus both the original panel and the entire court considered the application of Townsend v. Sain to this case on the first appeal.

Moreover, it is clear that Townsend v. Sain is simply not relevant to this case now, nor was it on the first appeal because Smith was offered an evidentiary hearing on the first petition for a writ in the district court, and he rejected the offer. The record of this proceeding shows that the district court was very concerned that the record before it be full and complete and that Smith have every opportunity to put in the record all that he thought essential:

> The Court: "Let me say this. There may have been some misunderstanding on our last discussion, but it was my thought, and I think I initiated the idea that I didn't want counsel on the side of the defendant, or the side of the state or anybody involved in this case feeling dissatisfied with the state of the record; that I wanted this record to be as complete as you thought it should be. * * * I just wanted everybody to be satisfied that they had, so far as they were concerned, this

> record in complete form so that here and later and wherever you may go, whoever takes the initiative of going from here to somewhere else would not be called upon to argue that this is incomplete and this matter really hasn't been heard as yet."

Later on in the same proceedings, Smith's then- attorney stated:

> "*The United States Supreme Court says your Honor may hold a hearing de novo if need be to go into the historical facts behind this case. I don't think it is necessary here.* I think if your Honor limits himself to the record, I think that the error, the fundamental constitutional error in this case is so overwhelming that I need not stand here and argue this case at any great length.
>
> "Now, if we understand each other, so there will be no mistake about it, we rely solely and wholly upon this amendment and supplemental petition your Honor now has before you with the exceptions that I noted at my last appearance of Exhibit C attached to the original petition, which is the excerpts of the statutes. * * * With that addition, I say we rely solely upon this amended and supplemental petition. * * *" (Emphasis supplied.)

Thus there can be no doubt that the district court offered, and Smith's counsel rejected, an evidentiary hearing.

The order of the district court will be affirmed.

BIGGS, *Circuit Judge dissenting.*

On consideration of the facts of the case at bar and what I deem to be the applicable law I must respectfully dissent.

STATEMENT OF FACTS

The relator-appellant Smith, convicted of murder in the first degree and sentenced to death, for the second time in this court seeks release by a federal writ of habeas corpus. A brief history of the protracted litigations involving Smith is set out below.[1] These litigations will be referred to at greater length hereinafter.

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[1] Smith's conviction was affirmed by the Supreme Court of New Jersey. State v. Smith, 27 N.J. 433, 142 A.2d 890 (1958). A petition for habeas corpus was dismissed by the United States District Court apparently for failure to exhaust state remedies. Smith did not apply immediately for certiorari to the Supreme Court of the United States but moved for a new trial chiefly on the ground of newly discovered evidence. The motion was denied, and the denial was affirmed by the Supreme Court of New Jersey. State v. Smith, 29 N.J. 561, 150 A.2d 769 (1959). Certiorari was denied by the Supreme Court of the United States, 361 U.S. 861 (1959). Smith again sought habeas corpus in the United States District Court for the District of New Jersey. The writ was denied. U.S. ex rel. Smith v. New Jersey, 201 F.Supp. 272 (D.N.J. 1962). This court affirmed, 322 F.2d 810, Circuit Judge Ganey dissenting. A petition for rehearing before this court en banc was filed and was denied by a 5 to 2 decision, Judge Ganey and the present writer dissenting. The Supreme Court denied certiorari, 376 U.S. 928 (1964), Mr. Justice Douglas dissenting. The petitioner then filed a Petition for Post-Conviction Relief which was denied by the Bergen County Court on April 17, 1964 and that denial was affirmed by the New Jersey Supreme Court. State v. Smith, 43 N.J. 67, 202 A.2d 669 (1964). The Supreme Court denied certiorari, 379 U.S. 1005 (1965), reh. denied, 380 U.S. 938 (1965). A subsequent Petition for Habeas Corpus was denied by the Bergen County Court on March 29, 1965 and leave to appeal was denied by the New Jersey Supreme Court on April 13, 1965. A further Petition for Reconsideration was denied on June 22, 1965. Thereafter, on July 13, 1965, the present, the Second Petition for a Writ of Habeas Corpus was filed in the United States District Court for the District of New Jersey and was denied as was an Application for Reconsideration. The appeal at bar followed. State Court remedies have been exhausted.

A fifteen year old girl, Vickie Zielinski, was brutally murdered under circumstances which tended heavily to incriminate Smith. Her body was found about 9:20 A.M. on March 5, 1957, in a deserted area known as the "Sand Pit" in Bergen County. About 11:30 P.M. on March 5, police arrested Smith on information supplied by Gilroy who had loaned an automobile to Smith. On the night of March 5, Smith went to bed at 7 P.M., but at 7:30 P.M. his wife wanted to visit her mother's house in Ridgewood. Smith went to bed again at approximately 10 P.M. at the Ridgewood house and soon fell asleep. He was awakened by the police and taken to the police headquarters in the Township of Mahwah. The record shows that Smith had no sleep from about 8:30 A.M. on the morning of March 5 until about 3:45 P.M. on March 6, 1957, a period of about 31 hours with the exception of perhaps an hour and a half on March 5. About 10 A.M. on March 6 he broke down, cried, and asked for a Catholic priest. At this time the police had possession of the car that Smith used on the night of the crime which contained a blood-stained mat. The police also had obtained Smith's shoes and socks worn by him on the night of the murder and an admission from him that he was at the scene of the crime with Zielinski and also that he had given her "a good shot", a strong blow. Smith was not informed of his right to remain silent, of his right to counsel, or that anything he said might be used against him. I will discuss Smith's allegations as to his treatment by the police at a later point in this opinion. See note 12, *infra*. Smith was not formally charged with murder at the time of this interrogation but it is clear that he was vehemently suspected.

In Smith's statement, as transcribed, appear many incriminating facts. Although he did not categorically admit that he had killed Zielinski his statement in substance constituted a confession. Shortly thereafter he was indicted on a charge of first degree murder. About five days after the interrogation and after indictment, deLisle, a police detective, came to Smith in jail and asked him to sign a transcript of his statement, some 39 pages in length, which the reporter had transcribed from his notes. Smith had employed counsel at some date not clear from the record but prior to deLisle's visit. Smith refused to sign the transcript, informing deLisle that his counsel had advised him not to do so. deLisle asked Smith to read the statement, however, and later drew from him an admission of its correctness. Under the law of New Jersey it is unnecessary that an accused sign a confession to make it valid, only that he read it and acknowledge its correctness. State v. Cleveland, 6 N.J. 316, 327-30, 78 A.2d 560, 565-67 (1951). Smith testified at his trial that he was not mistreated. Issues relating to the voluntariness of Smith's statement and his admission of its correctness will be dealt with at greater length at a later point in this opinion.

Smith was found guilty of first degree murder and since there was no recommendation of life-imprisonment he was sentenced to death as required by the law of New Jersey. An appeal was taken from the judgment of conviction to the Supreme Court of New Jersey, which affirmed. State v. Smith, 27 N.J. 433, 142 A.2d 890 (1958). Smith made no immediate application for certiorari, but moved for a new trial principally on the ground of newly discovered evidence.[2] His motion was denied and the denial was affirmed by the Supreme Court of New Jersey, 29 N.J. 561, 150 A.2d 769. Smith then petitioned for certiorari which was denied. Smith v. New Jersey, 361 U.S. 861 (1959). Smith next sought habeas corpus in the court below. The writ was denied him. 201 F. Supp. 272 (1962).

The court below, Judge Lane, wrote an exhaustive opinion, dividing Smith's arguments into three main groups, "I. Issues Not Raised in the State Courts", "II. Issues

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[2] See the items constituting alleged newly discovered evidence as set out in the opinion of the Supreme Court of New Jersey in State v. Smith, 29 N.J. 561, 150 A.2d 769 (1959).

Raised in the State Courts", and "III. Issues Raised in Part in the State Courts". Judge Lane described Smith's contentions by setting out twelve categories, as follows: (1) an accumulation, combination and aggregation of errors in the State Court, allegedly constituting a denial of due process; (2) the assertion that the State should produce a tape recording of a "truth serum", a sodium amytal, test that had been administered to Smith; (3) a contention that Smith was unlawfully arrested; (4) that Smith was not given the opportunity to object to the trial court's charge before the jury retired; (5) that after the rape-murder theory of the case advanced by the State was declared by the trial judge to be insufficiently supported by the evidence, there was no adequate charge to remove this issue from consideration by the jury;[3] (6) that Smith's trial counsel was inadequate; (7) that a new trial was improperly denied; (8) that the charge of the trial court on the issue of the voluntary nature of Smith's admissions was fundamental error; (9) that the admissions of Smith, in substance constituting a confession were involuntary; (10) that the judge did not allow the jury to consider the alleged non-voluntary nature of Smith's statement after he had determined that they were voluntary; (11) that the trial court was in error in failing to charge properly and lawfully as to Smith's defenses, and (12) that the charge of the trial court was erroneous in that there was failure to charge as to all possible degrees of homicide, including manslaughter.

Judge Lane decided that the issues presented by the first eight categories had not been raised in the New Jersey State Courts and that therefore Smith had not exhausted his state remedies in respect to them as required by 28 U.S.C. Section 2254. As to the eleventh and twelfth categories, Judge Lane found that Smith failed to exhaust his state remedies on parts of those claims. As to the other parts, Judge Lane agreed with the holding of the New Jersey Supreme Court that no error had been committed by the trial court in charging the jury as to Smith's asserted defenses and in exploring the difference between first and second degree murder. Judge Lane devoted most of his opinion to categories nine and ten, respecting the voluntary or involuntary nature of the incriminating statement made by Smith, his admissions. He concluded that Smith's admissions contained in the statement were voluntary and were admissible. See Id., *supra,* at 276-282.

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[3] See p. 976a of Smith appendix on his appeal from the judgment of conviction to the Supreme Court of New Jersey at docket #2359. See State v. Smith, 43 N.J. 67, 202 A.2d 669 (1964).

It would appear that Judge Lane, however, did not hold a plenary evidentiary hearing on the issue of the voluntariness of Smith's statement or confession. The majority opinion states that such a hearing was offered by Judge Lane to Smith but that his counsel rejected it, quoting the colloquy between Judge Lane and Smith's counsel. I am far from certain, however, that there was an offer of an evidentiary hearing or that Smith's counsel rejected it.[4] Judge Lane had oral argument and ordered produced and had before him (1) the transcript of Smith's trial, (2) the transcript of the hearing on the motion for a new trial, and (3) the briefs and appendix on the first appeal to the Supreme Court of New Jersey and on the second appeal to that Court and also the petition for certiorari to the Supreme Court of the United States.

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[4] The matter is far from clear. Judge Mendon Morrill had been conducting the habeas corpus proceeding. Upon his death the case was assigned to Judge Lane. Judge Lane permitted counsel to file a supplemental habeas corpus petition and an answer thereto. The colloquy between Judge Lane and counsel seems to me to be directed to the issue of whether or not the case would proceed upon the original petition for habeas corpus and answer, the supplemental petition for habeas corpus and answer, or on both sets of pleadings. See pp. 121a to 127a of the Appellant's Appendix. In any event Judge Lane could not have had the decision in Townsend v. Sain, 372 U.S. 293 (1963), before his eye because at the time of the hearing referred to the opinion of the Supreme Court had not yet been handed down.

The denial of habeas corpus by Judge Lane was affirmed by this court on July 24, 1963, two judges, dissenting, one on denial of rehearing, 322 F.2d 810 (1963). This court held, inter alia, that Smith's statement was voluntary and that any issues presented by the failure of the State to produce a tape recording in relation to the use of a "truth serum", sodium amytal test, hereinafter referred to, were not properly before Judge Lane and therefore not adjudicable on appeal. This court also stated: "It is very plain that the trial judge, under the governing law of New Jersey at that time, held an adequate preliminary hearing as to the voluntariness of the statement. It is also very plain that his decision that the statement was in the nature of a confession and that it was voluntary, was fully supported by the evidence."[5] No express ruling was made in respect to the acknowledgment by Smith of the correctness of his incriminating statement to deLisle. Townsend v. Sain, 372 U.S. 293, had been decided on March 18, 1963. The Supreme Court denied certiorari, 376 U.S. 928 (1964), Mr. Justice Douglas dissenting. But see Sobell v. United States, 344 U.S. 889-90 (1952), opinion by Mr. Justice Frankfurter.

Later, in 1964, Smith brought a proceeding for post-conviction relief in the New Jersey Bergen County Court. R.R. 3:10-a-1 to 3. Relief was denied. He then appealed to the Supreme Court of New Jersey raising many issues, some of which had been previously raised in the habeas corpus proceeding before Judge Lane hereinbefore referred to and, as appears, were adjudicated by this court. Some of the issues raised in the Supreme Court of New Jersey were those which Judge Lane had found had not theretofore been raised in the State Courts. The issues raised before the Supreme Court of New Jersey included (1) objections to the adequacy of the charge on several grounds; (2) the assertion that the issue of the voluntariness of Smith's confession was decided by the trial judge without the intervention of the jury; (3) the contention that the trial court erred in failing to charge on manslaughter; (4) the assertion that Smith was not bound in the post-conviction proceedings by the determination of issues by the denial of his motion for a new trial; (5) the argument that the State misused evidence relating to the so-called "truth-serum examination"; (6) the contention that certain physical property, such as articles of clothing, had been obtained by illegal search and seizure and were therefore not admissible in evidence; (7) the contention that the trial court failed to admit into evidence the fact that Smith had offered to submit to a lie detection test, and (8) the assertion that Smith's statement should have been excluded because he had no counsel when the incriminating statement was made or at the time when the State alleges that he admitted that the transcript of his incriminating statement was correct. The Bergen County Court, insofar as the record of the post-conviction proceedings before us shows, did not receive any evidence on the issue of whether Smith's incriminating admissions and his alleged affirmation of them were voluntary.

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[5] See United States v. State of New Jersey, 322 F.2d 810, at p. 817 (1963), decided July 24, 1963, reh. denied September 9, 1963. Judge Lane had made a substantially similar ruling, 201 F.Supp. at 278-82.

The Supreme Court of New Jersey ruled against Smith's contentions in respect to the inadequacy of the charge to the jury on the ground that his objections could not be urged by way of post-conviction relief. In respect to items "(2)", "(6)" and "(8)" the Court ruled that on the state of the law as it was at the time of Smith's trial, he had not been denied due process of law. As to item "(5)" the Court held that Smith's contention was invalid because he had failed to raise the issue at trial. Post-Conviction relief was denied, and Smith's stay of execution was vacated. State v. Smith, 43 N.J. 67, 84, 202 A.2d 669, 678 (1964). Certiorari was denied by the Supreme Court, 379 U.S. 1005, reh. denied, 380 U.S. 938 (1965). Subsequently, a petition for habeas corpus was denied by the Bergen County Court on March 29, 1965,[6] and leave to appeal was denied by the New Jersey Supreme Court on April 13, 1965. That Court also denied a petition for reconsideration on June 22, 1965.

On July 13, 1965, a second petition for habeas corpus was filed in the court below. This petition was enlarged by a supplement and eventually by an additional pleading designated as an "Application for Reconsideration". These are the pleadings presently before us. The bases for the relief sought were much enlarged by these pleadings. There was no plenary evidentiary hearing in the Court below, Judge Lane being apparently of the view that no substantial new constitutional issues were presented. The writ was denied and the appeal at bar followed. The allegations of the second petition for habeas and its supplements will be examined after discussion of the inquisition of the Bergen County Trial Court into the voluntariness of Smith's incriminating statement and his admission as to its accuracy.

Prior to any determination at Smith's trial as to whether Smith's admissions had been voluntarily obtained and prior to their admission into evidence, four witnesses testified in the presence of the jury that Smith's statement was given voluntarily. The reporter who took Smith's statement was the fifth witness to testify before the jury as to the voluntary nature of the statement and its contents. The prosecutor then offered the statement in evidence.

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[6] Efforts to procure complete records from the lower New Jersey State Courts of Smith's post-conviction applications for relief have proved unavailing. I am, therefore, forced to assume that no issues were decided by them except as indicated in this opinion. It is noted that in Townsend v. Sain, 372 U.S. 293, 319, it was held that in the absence of a state court record a Federal court may, and in some instances must hold an evidentiary hearing.

At this time Smith's counsel objected because he had not read the statement and doubted whether it met the legal requirements necessary to constitute a confession. Smith's counsel at that time also stated that he had no doubt that the confession was voluntary. Thereafter, having read the statement, Smith's counsel did object to the statement's admission into evidence but only on the ground that it did not constitute a confession under the law of New Jersey. At this point the jury was finally excused. There followed a colloquy between the prosecutor, Smith's counsel and the trial judge during which Smith's counsel made it clear that he did question the voluntariness of the statement.[7]

After the jury had withdrawn the trial court heard further evidence as to the voluntariness of Smith's statement. Smith himself testified, but he neither categorically admitted nor denied the voluntariness of his statement. He testified that his interrogation lasted for approximately ten and a half hours, that he was kept substantially without food and subjected to questioning by a battery of police officers. After the jury returned Smith again took the witness stand. He testified that he gave the statement because he was in fear of Hommell who he at least impliedly asserted was the actual killer, that he was questioned by a great many police officers, that the police pulled a sample of his hair from his head, that he had very little food, that he was without sleep for approximately thirty-one hours, and that his fiingernails were clipped. The trial court found

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[7] "Mr. Selser [Smith's counsel]: . . . I think too I should like to call Smith with regard to it [the statement] and have some testimony taken with regard to the circumstances preceding the taking, up to the time of the taking.

"The Court: As to the voluntariness?

"Mr. Selser: Yes, as to the voluntariness, as to his state of mind and the circumstances, all of which led up to the event, all of which would go into the voluntariness of the statement." Appendix to Appellant's brief in the Supreme Court of New Jersey, p. 537a.

Smith's incriminating statement to have been given voluntarily and that it constituted a confession under the law of New Jersey. The transcript of the statement was admitted into evidence when the jury returned. Later, Detective deLisle testified as to the alleged acknowledgment by Smith of the accuracy of the transcript, testimony the truth of which Smith denied. Smith's counsel made no objection to the admission of deLisle's testimony as to the alleged acknowledgment of its accuracy by Smith, without which the transcript would have been inadmissible.

In my view the incriminating admissions of Smith constituting the statement set out in the transcript, and Smith's acknowledgment of the accuracy of that transcript, may not be considered separately. They are logically inseparable and together present an issue of voluntariness under the Fourteenth Amendment. The Bergen County Court at Smith's trial did not consider these two elements in unity. No inquiry was made as to the voluntariness of Smith's acknowledgment of the accuracy of his statement to deLisle. Indeed, deLisle was not subjected to any meaningful cross-examination.[8, 9] The State's witnesses were scarcely cross-examined at all. All relevant facts were not presented at the State Court hearings. I emphasize again that Smith was not warned of his rights, and that this admitted fact was not brought upon the record except perhaps by implication. There was no other fact

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[8] Smith's trial counsel's cross-examination consisted of two questions: "Q. Who was his lawyer then? A. I think a Mr. Gaudielle. Q. I was not then his lawyer, was I? A. I don't think so." See 521a of Appendix filed in the Supreme Court of New Jersey at Docket No. 2359. See note 3, *supra*.

[9] We cannot deem the failure of Smith's counsel to object to be a waiver of a constitutional right by Smith. See the doctrine of fundamental error, McNello v. John B. Kelly, Inc., 283 F.2d 96, 101-103 (3 Cir. 1960). See also 28 U.S.C. Section 2106. Cf. Rule 51, Fed. R. Civ. Proc., 28 U.S.C.

inquiry. I cannot deem the examination of this issue to have been sufficient to meet constitutional requirements.[10]

But it is necessary to deal now with the issues presented by Smith's second petition for habeas corpus, its supplement and the application for reconsideration by the court below.[11] If these lengthy pleadings be examined and their allegations contrasted with the evidence given by the witnesses at the inquiry by the Bergen County Trial Court into the voluntariness of Smith's incriminating statement, it will be observed how comparatively little evidence that

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[10] The Supreme Court's decision in Johnson v. New Jersey, 384 U.S. 719 (1966), which held Escobedo v. Illinois, 378 U.S. 478 (1964), and Miranda v. Arizona, *Id.* at 436 (1964), to be nonretroactive, emphasizes the importance, one of long standing, of the protection to be accorded under Townsend v. Sain, *supra.* Mr. Chief Justice Warren stated, *Id.* at 730:

> "At the same time, our case law on coerced confessions is available for persons whose trials have already been completed, providing of course that the procedural prerequisites for direct or collateral attack are met. See *Fay* v. *Noia,* 372 U.S. 391 (1963). Prisoners may invoke a substantive test of voluntariness which, because of the persistence of abusive practices, has become increasingly meticulous through the years. See *Reck* v. *Pate,* 367 U.S. 433 (1961). That test now takes specific account of the failure to advise the accused of his privilege against self-incrimination or to allow him access to outside assistance. See *Haynes* v. *Washington,* 373 U.S. 503 (1963); *Spano* v. *New York,* 360 U.S. 315 (1959). Prisoners are also entitled to present evidence anew on this aspect of the voluntariness of their confessions if a full and fair hearing has not already been afforded them. See *Townsend* v. *Sain,* 372 U.S. 293 (1963). Thus while *Escobedo* and *Miranda* provide important new safeguards against the use of unreliable statements at trial, the nonretroactivity of these decisions will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim."

[11] For the sake of brevity we will refer to these conglomerate pleadings as the "second petition for habeas corpus".

Court had before it relating to the period between the time when Smith was first taken into custody by the police and the time when he gave his incriminating statement. But the period of time referred to is of vital significance in ascertaining the voluntariness of Smith's statement. The allegations of the petition are fairly set out in the relator's brief and are quoted verbatim in the footnote below.[12]

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[12] As follows: Smith's first contact with the police came when he was taken into custody at about 11:00 p.m. on March 5, 1957. He had just gotten into bed when the police arrived and told him they wanted him to go with them to the Mahwah Police Station. The police gave no specific reason for their request. Smith had been awake since 8:30 that morning, and when taken into custody by the police he had been without sleep for 14½ hours. In addition, he had been ill for several days and still was unable to eat solid foods. At Mahwah he was taken to a small office and interrogated by Prosecutor Calissi, Assistant Presecutor Galda, Mahwah Police Chief Smith, Captain De Marco of the prosecutor's office and several other police officers. He was not advised of any rights he might have. During this time Prosecutor Calissi asked him if he would consent to a lie detector test, telling him it could not hurt him if the story were true and that in any event it could not be used in Court. Smith said he would prefer to see a lawyer before consenting. Captain De Marco said the county prosecutor should know better than any lawyer, but Smith continued to refuse the lie-detector test and the subject was dropped.

After this questioning, the next five hours were spent in three or four trips to various places, including two trips to the scene of the crime. Between these trips, Smith either was interrogated or required to sit in the Municipal Courtroom. The respites from interrogation did not total more than one half hour, and during this period he could not smoke nor speak except in response to questions. He was always guarded by one of the detectives. Detective Sinatra was at his side all night long, including in the men's room. During the night he asked Captain De Marco if he could phone his wife because she might be waiting up for him. He was told by the Captain that he did not have authority to permit that.

During the trips he was asked continually to tell his story, to "tell it again". Sinatra sat in the back seat of the car with him on every trip and Sinatra constantly repeated that he would hate to be asked the same questions over and over and that if he (Sina-

Some of the facts referred to were testified to at the Bergen County trial, but very many were not. One of the apparent issues left uninvestigated is the asserted administration of

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tra) had something to say he would want to say it and would then feel better. It seemed to Smith that Sinatra would ask him every few minutes how Smith thought the guy who "did this" must feel "right now." Sinatra would answer his own question by saying "the guy is probably wishing he could talk to someone and get it off his chest."

At about 5:00 a.m., Smith was taken by Captain De Marco and Detective Sinatra to De Marco's home where the Captain left them and told Sinatra to take Smith to a diner for breakfast. At the diner Smith ordered eggs, toast and coffee but his stomach was still upset and he could not eat the eggs. The cup of coffee was his second since being taken into custody; he finally was permitted to smoke. He asked again if he could stop and see his wife since the diner was only a couple of blocks from his mother-in-law's home, but Sinatra would not permit that and would not permit Smith to phone her.

From the diner Sinatra picked DeMarco up at his home and drove Smith to the Hackensack office of the County Medical Examiner, Dr. Gilady. The doctor stripped Smith naked and examined him. Smith was not told that he was going to be examined nor was he told the purpose of the examination. He was not told of any right to refuse the examination. He was examined by the doctor in the presence of several police officers. Thereafter, he was taken to the prosecutor's office in the County Court House, at about 8:30 a.m. By that time he had been in custody 9½ hours and without sleep for 24 hours.

In a small side office at the prosecutor's office, a photographer arrived and photographed Smith's knees. Shortly after the photographs were taken and after repeated requests, Smith was permitted to phone his wife. Prior to requesting this permission to telephone his wife, he had requested and been denied permission to call an attorney. He asked and was also denied permission to call a Judge Dwyer, a former county judge and the father of a personal friend. He was told by a detective that there was no need for him to call an attorney because the prosecutor was a "good guy" who only "hated bookies" and that he would see to it that Smith got a "fair shake." The dectective told Smith of another defendant, a "poor guy" who could not afford a lawyer but who would get a good break from the prosecutor because he sodium amytal in the so-called "truth-serum" test to Smith, even though this was done at the request of Smith's own counsel. Smith asserts the information elicited from him

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"cooperated." He told Smith also that the prosecutor was a member of the Knights of Columbus and a good Catholic who would treat him right. Smith again asked to be allowed to call an attorney and was told that he could call only his wife and to stop being "smart." At this time Smith had been awake more than 24 hours and did not feel like arguing.

A detective asked Smith his wife's telephone number, the number was checked in the telephone book and the call was put through by a detective. He was advised not to worry his wife because he would not need a lawyer. He was allowed to speak to his wife for a few minutes and during this period asked her to contact Judge Dwyer, who is his friend and ask him to seek his release from custody. He was then told that was all he could say and to hang up. After he hung up a dectective asked him if he knew the Judge and said he should not have bothered him because he did not need an attorney.

Shortly after the telephone call to his wife, he saw her standing in a corridor outside the office in which he was being questioned. He was told that she also was being questioned. Several times throughout the rest of the day he requested permission to see his wife, and was denied such permission. He was told he could see her and she could go home when Smith started "giving a few answers."

Smith later learned that his wife had been picked up by a county police radio car immediately after his phone call, that she was denied permission to speak with him, that she was told she could not call a lawyer because Smith did not need a lawyer, and that she was not permitted to call anyone until later in the day when his confession had been secured.

Following the telephone call to his wife, detective Spahr made Smith strip naked again and removed his clothing from the room. Before he left he told Smith to remain standing but after he left de Lisle told Smith he could sit. Spahr returned in a few minutes and shouted to Smith, "Who the hell told you to sit?" De Lisle said he had allowed Smith to sit whereupon Spahr pushed him back into the chair. This routine was performed three or four times. At one point Smith was pushed over the chair and onto the floor. After this incident de Lisle talked with Smith for a period of time and told him the questioning would go on until he on the occasion of the administration of the drug was employed by the State of New Jersey unfairly and unlawfully and that his trial was prejudiced thereby. Another issue

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told the truth, that it would be better to clear things up, that his wife whom Smith had seen standing in the corridor was worrying and waiting to see him. Spahr then returned and told Smith that a priest from Don Bosco High School was waiting to see him and Smith was given a gray coverall to wear, which he later learned was a county jail work uniform. Up to this point Smith had been naked.

With regard to the priest, Smith alleges that he had never seen the priest before in his life, that he did not know his name, that he denied the crime when the priest asked him if he had done it, that he asked the priest to see his wife and find out if she had obtained a lawyer but the priest's response was that he could not help his wife because she was not a Catholic.

By noon on March 6, 1957, after continued questioning, after being refused all requests to see his wife, after being denied requests to call his lawyer, after being told that his trousers had been identified by his wife, that she was being questioned and had signed a statement, after being told that laboratory tests of his clothing had proved that he had been with the victim, that his wife was crying and he could see her as soon as he made a statement and that his wife would be taken home after he had "talked", he agreed to make the statement. Captain De Marco had told him how he thought the crime had been committed. It was Smith's hope to make a brief statement, without admitting guilt, which he could repudiate after seeing his attorney. He was tired, having been awake for 27½ hours, and was ready to do and say anything he was told.

After the statement had started but before Smith was taken outside, the prosecutor told him to wash and shave because photographers were outside and he looked terrible. He had been wearing the coveralls, and his colthing was returned to him.

Certain of the allegations made by Smith are supported by his mother. His mother's affidavit, concerning many facts which were told to her by Smith's then wife who was 19 years old, are supported to some degree by a statement taken of Smith's former wife by present counsel on August 5, 1965 in the presence of the former's wife's new husband and her attorney. The gist of this affidavit is that almost immediately after Smith had called his wife and asked to call Judge Dwyer, she had been picked up by left undecided is that the Bergen County trial court did not charge the jury that if Smith was guilty of first-degree murder without recommendation of life imprisonment the imposition of the death penalty was mandatory. The facts relating to these allegations should be explored and found by the trial court.

Whatever may be the status of our former decision in United States v. State of New Jersey, *supra,* filed July 24, 1963, Smith's constitutional rights should now be reconsidered in the light of Townsend v. Sain for the principles of that decision are applicable retroactively and the doctrine of res judicata is not available in the habeas corpus proceeding presently before us. See Kimbro v. Heer, Warden, 386 U.S. 128 (1967), in which the Supreme Court vacated *Per Curiam;* a judgment of the Court of Appeals for the Sixth Circuit handed down in Kimbro v. Heer, Warden, 364 F.2d 116 (1966), and remanded the case to the District Court, citing Townsend v. Sain. Similar action was taken by the Supreme Court in Green v. Bomar, 379 U.S. 358 (1964).

In view of the foregoing, I would vacate the judgment of the court below and would remand the case for a plenary evidentiary hearing on the issues indicated in this opinion

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detectives from the prosecutor's office, and between the time of his call to her and the time she was picked up by police she had not had a chance to call either Smith's mother or Judge Dwyer. She was taken to the prosecutor's office and questioned by detectives and asked to identify Smith's pants. She asked many times for permission to see Smith but this was denied. She was told that Smith was there only for routine questioning, that they were questioning other people and that he did not need a lawyer. She was not returned to her mother's home until about 4:10 p.m., after Smith had given his statement. It is apparent from the affidavit of Smith's mother, taken together with Smith's allegations that he had called his wife and shortly thereafter caught a glimpse of her in the corridor while he was being held in a room, that the prosecutor had seen to it that Smith's wife was picked up prior to her being able to obtain a lawyer for her husband.

and any others which the court below might deem relevant. If the court below found facts and conclusions of law in favor of the State of New Jersey, some of the issues discussed herein would be adjudicated. If those issues were decided in Smith's favor, habeas corpus should then be granted by the court below and a new trial required. In either event issues involving the application of principles enunciated in Escobedo v. State of Illinois, 378 U.S. 486 (1964), Miranda v. State of Arizona, 384 U.S. 436 (1966), Jackson v. Denno, 384 U.S. 719 (1966), Massiah v. United States, 377 U.S. 201 (1964), and in associated decisions, may require determination.[13] If the second contingency comes to pass it would be presumptuous to suggest herein now how the principles of the decisions referred to should be applied by the New Jersey State Tribunals. If the first contingency eventuates, the court below should apply the principles of the decisions referred to insofar as they are pertinent. To state views now in the absence of findings of fact and conclusions of law by the court below, respecting the application of those principles would be futile. Moreover, the Supreme Court has made it clear that constitutional issues should not be decided except upon a full record. Honeyman v. Hanan, 300 U.S. 14, 25-26 (1937); Villa v. Van Schaick, 299 U.S. 152, 155-56 (1936).

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

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[13] I point out that though issues have been raised by the relator-appellant respecting the possible application of the principles enunciated in these cited cases the majority opinion in no wise directs itself to the problems presented.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16128

UNITED STATES OF AMERICA ex rel.
EDGAR H. SMITH, *Appellant*,
v.
HOWARD YEAGER, Warden, New Jersey State Prison
at Trenton

ON PETITION FOR REHEARING

Present: HASTIE, *Chief Judge*, McLAUGHLIN, KALODNER, STALEY, FREEDMAN, SEITZ and VAN DUSEN, *Circuit Judges*.

Opinion of the Court

(Filed March 15, 1968)

PER CURIAM.

The petition for rehearing in this case has been considered and presents no new argument. A majority of the circuit judges in regular active service not having voted for rehearing en banc, the petition for rehearing will be denied.

FREEDMAN, *Circuit Judge*, dissenting.

Judge Biggs' dissent from the majority opinion of the panel raises for me sufficiently grave questions to require rehearing before the court en banc.

The majority opinion of the panel declares that "all the points now raised by appellant" were "fully considered

. . . on the occasion of his first appeal to this court" in *United States ex rel. Smith* v. *New Jersey,* 322 F.2d 810 (3 Cir. 1963) cert. denied, 376 U.S. 328 (1964). The panel majority therefore "consider that opinion dispositive" of this second appeal. It seems to me, however, that three claims in this second petition for habeas corpus were not adjudicated in our prior decision.

(1) Appellant claims that his confirmation of his confession, given after his indictment, was unconstitutionally obtained because it was taken outside the presence of his counsel, contrary to the subsequent rule of *Massiah* v. *United States,* 377 U.S. 201 (1964), which he contends is retroactively applicable to his case. While the facts on which this claim is made were in the first petition for federal habeas corpus this contention obviously could not have been advanced in the first case either in the district court or on appeal to us, for *Massiah* was handed down after we decided the first appeal.

(2) Appellant claims that evidence against him was obtained as a result of information involuntarily extracted from him by the use of a truth serum. This claim substantially was presented in appellant's first petition for federal habeas corpus, but it was not considered either in the district court or by us on appeal because of failure to exhaust available state court remedies.

(3) Appellant claims that he was deprived of due process because the jury was permitted to render a verdict of guilty of first degree murder which automatically required the imposition of the death penalty without being informed that this consequence would follow unless they made a recommendation of mercy. This claim was not raised in the first petition for federal habeas corpus and was not involved in the first appeal.

I say nothing of the merits of these contentions. It is enough for me that they were not previously adjudicated and are now lost in the majority's conclusion that the first appeal is dispositive of the present one.

Appellant also claims that he is entitled to a federal court hearing on the voluntariness of his confession because the state court record is inadequate under the expanded right to a hearing recognized in *Townsend* v. *Sain*, 372 U.S. 293 (1963).[1] This claim was rejected by the district court on the ground that it was adjudicated by our decision on the first appeal. The panel majority now affirms this and adds that although the first appeal was argued before *Townsend* v. *Sain* was handed down, its application to appellant's first appeal was considered by the first panel in rendering its decision and by the court en banc in refusing a petition for rehearing in which *Townsend* was expressly relied on.

I find this answer to appellant's claim unpersuasive because appellant makes substantial allegations in the present proceeding which do not appear in the prior federal habeas corpus proceeding or in the state court record and which go to the question of the voluntariness of his confession and therefore affect the adequacy of the state court record.

For example, appellant now alleges for the first time that during his interrogation before making his confession he was forced to strip naked and was left in a room with two detectives who taunted him, pushed him, and knocked him down. He alleges that during this episode the detectives told him that they would question him until he told them the truth and that his wife whom he had seen in the corridor was worried and was waiting for him. He also adds now, among other new allegations, that his statement was made after the police told him that his wife, who was being held by them, would be released when he "talked".

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[1] See also the new habeas corpus act, 28 U.S.C. § 2254(d).

The fact that appellant did not present such facts in his first petition for federal habeas corpus should not preclude our consideration of them now. That proceeding occurred prior to *Townsend* v. *Sain*, when a federal plenary hearing was considered primarily a matter of grace rather than of right (*Brown* v. *Allen*, 344 U.S. 443 (1953)) and when counsel could readily have believed that allegations such as these would be unavailing.

I also do not believe appellant's claim that he is entitled to a federal habeas corpus hearing may be rejected summarily on the ground of waiver, even if the language of his then counsel, quoted in the majority opinion of the panel, is construed as an expression of belief that the state court record was adequate and that a federal hearing therefore was unnecessary. It is clear that counsel will not be deemed to have waived a right which did not exist at the time. To me it is equally incredible that counsel should be said to have waived in its entirety a right which existed only partially at the time.

Even if it could be said that counsel had waived expressly and completely all right to a federal hearing, I have serious doubt that such a waiver should be held binding on a defendant in a capital case. We should be on guard against applying to a defendant in such a case a doctrine which would estop him from the assertion of rights which might save his life because of an erroneous judgment of his lawyer which does not deal with the merits of his claim.

I therefore believe the case should be reheard before the court en banc and dissent from the denial of the petition for rehearing.

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Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,128

THE UNITED STATES OF AMERICA, EX REL.
EDGAR H. SMITH, *Appellant,*

v.

HOWARD YEAGER, Warden, New Jersey State Prison
at Trenton

(D. C Civil Action No. 766-65)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: HASTIE, *Chief Judge,* and BIGGS and STALEY, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed June 23, 1966, be, and the same is hereby affirmed, with costs.

ATTEST:
M. ELIZABETH FERGUSON
M. Elizabeth Ferguson,
Chief Deputy Clerk

January 2, 1968

Order

(Received March 14, 1968)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,128

UNITED STATES OF AMERICA EX REL.
EDGAR H. SMITH, *Appellant*,

v.

HOWARD YEAGER, Warden, New Jersey State Prison
at Trenton

SUR PETITION FOR REHEARING

Present: HASTIE, *Chief Judge*, MCLAUGHLIN, KALODNER, STALEY, SMITH, FREEDMAN, SEITZ and VAN DUSEN, *Circuit Judges*.

The Petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court
(Sgd.) STALEY
Judge

Dated: March 15, 1968

Article

(Esquire Magazine, November 1965)

THE APPROACHING END OF EDGAR H. SMITH, JR.

by William F. Buckley, Jr.

It is very difficult, in New Jersey, to arrange to see a prisoner in the Death House. The visiting regulations were clearly designed in an age when neither legal hanky-panky, nor a deep social ambivalence concerning capital punishment, nor a Supreme Court that sometimes seems more tortured by punishment than by crime, could separately or in combination work to keep a man in the Death House almost endlessly. A few months used to be routine; and then the prisoner was executed, or, under special circumstances, the Governor would reprieve the sentence. Meanwhile, there were to be very few amenities, and practically none at all of a social character. One member of your immediate family may visit you once a month, and you can write home fives times every month. The correspondence, in and out, is checked by prison monitors, who are supposed to look out for any signs that you are preparing a jailbreak, but who, inevitably, by their faceless presence on every page, inhibit a prisoner, as also a naturally reserved correspondent. The monitor, whose stool is set up alongside your own, is also there to listen to every word spoken to or by the prisoner.

Several years ago I wrote to a prisoner at the Death House, having seen a newspaper clipping which described, among other things, his reading habits, to ask if he would care to receive *National Review,* a journal I edit. The clipping from a New Jersey newspaper reported on a day in the life of Edgar Smith, #34837 D.H., as he is officially designated, then twenty-seven years old. The article mentioned that he used to read *National Review* but no longer saw it because the chaplain whose copy he used to borrow had been transferred. My letter was returned by the prison authorities, with a form note to the effect that I was not an authorized correspondent of the prisoner. One needs, then, to dig around a bit. I did so, and in due course the prisoner and I exchanged, under a temporary dispensation, one or two letters. *"I hope all these problems,"* he wrote me, *"will soon be solved and that the temporary difficulties will not reduce your interest in my case."* The temporary difficulties had to do with an attempt by a colleague, Donald Coxe, to visit Smith—we had decided to prepare an article on his extraordinary case. But the application to visit the prisoner was ruled out of the question even for Coxe, who is a lawyer. Judge Arthur O'Dea of Bergen County—who presided at the trial and sentenced Smith to death (he had no alternative: the jury did not recommend mercy), appears to have done his duty vigorously during the subsequent eight years in galloping off to every corner of the legal battleground just in time to shoot down Edgar Smith's latest, most unexpected, most ingenious legal flyer—said No: in unambiguous terms. He will not permit, he was quoted as saying, the Edgar Smith case to become another Caryl Chessman case. Besides—the judge didn't say this, but I infer from his behavior that he profoundly believes it—Edgar Smith is, as the jury found, guilty as sin, and the time has come to stop humoring him in the courts of law, and get on with the sentence demanded by law.

But after two and one-half years, Judge O'Dea relented. He is, one judges, a very good lawyer (and, undoubtedly, a very good man); and he felt he had to authorize one (1) visit when, a few months ago, I undertook to think through the problem of financing Smith's final fight to save his life. It was Smith, not I, who detected, in this new role of mine, safe passage around the dragon's lair. In February of this year he wrote to tell me that the United States Supreme Court had denied his most recent petition for a retrial.

And then, as is characteristic when he has bad news to report—which has been exactly as often as any court of law has ruled on one of his myriad appeals (a total of seven times in the period I have been in touch with him)—he follows up the gloomy news with a dash of optimism or, less frequently, of good news. "Well, I'm not a total failure. Judge O'Dea has granted the request for the Court order allowing visitation. The dungeons have been thrown open for your inspection."

I drove around the squat red-stone prison, which casts its gloom over the entire center of Trenton, looking for the tiny doorway through which visitors are unwelcome, and thought about the problem of the immediately preceding few days. Smith, for the first time in my experience, was furious. Judge O'Dea's permission to visit Smith had been actively opposed by the prison's warden and, one gathers, by a New Jersey newspaperman resentful that another journalist was being permitted, though to be sure not in his professional capacity, into the forbidden area. Two days earlier, Smith had written me that the anti-Visit forces had made their move. *"You won't have any trouble getting in to see me—the Order assures that, but the visit would probably be a waste of your time. Rather than follow the accepted procedure of appealing the Order, someone came up with the bureaucrat's typical back-door approach; they obtained a letter-opinion from a Deputy Attorney General, giving the Order an interpretation which virtually nullifies its effect. This interpretation is that the Order bans any discussion of my case—past, present, and future."* In other words, although I was to be permitted to see him, I was not to be permitted to discuss any of the reasons why I was visiting him at a penitentiary, instead of at the home where his mother brought him up, in Ramsey New Jersey, or at the trailer camp where he lived with his wife and baby in next-door Mahwah at the time the murder was committed. *"Bill, I'll tell you right now that Smith has just about had it."* I was truly alarmed, after long experience with his preternatural serenity. *"I don't think we should give in and allow the Order to be circumvented. You can come down next Friday if you wish, but my opinion is that we should go back to Court. This Deputy Attorney General doesn't have a leg to stand on; I think his interpretation should be appealed. Please, let me know what you think, I'm too burned up right now to write any more."* I wired him that I would arrive as scheduled.

I was taken in to see Mr. Edmonds, the assistant to Warden Yeager, who was in conference. Mr. Edmonds asked me whether I knew of the restrictions the Attorney General had imposed on my visit, and I said I did. Would I wait just a few moments, to meet Warden Yeager, before going in to see Smith? I would, with pleasure; and attempted to make some appropriate conversation. When was the last execution? A long time ago in January, 1963. When was the first? At the turn of the century. How many men had died on that chair. One hundred sixty. How many men were presently in the Death House? Fourteen. Capacity? Eighteen. Where had Bruno Hauptmann, the killer of Lindbergh's baby, stayed? In the cell directly above Smith's.

Warden Yeager was ready, and I met him and his staff, and we exchanged pleasantries. A big man, tough, duty-minded, but nonetheless friendly. It remained for me to be frisked, and an official took me to a private room and asked me to empty my pockets of anything with metal in it. I did so perfunctorily and he began to move a metal-detecting type instrument down from my head. It reached my chest and let out an angry and sustained beep. He shut it off and asked me to examine my breast pocket. Out came a Scripto pencil, with the little offending aluminum catch. The search went on. Twice more the Frisker (pat. pend., I noticed) caught me in flagrante, but finally it reached my shoes, and finding there not a file nor even a razor, I was moved on and introduced to Captain Malkin, who was to be my companion. We moved to a great partition, and a turnkey opened a door. We stepped into a circular, silo-like structure, from which two corridors went out, where the regular prisoners were quartered. It is completely enclosed and high above it, surrounded by bulletproof glass, is the central communications center of the prison. From there an official will confirm, or deny, an escort's instructions to the turnkeys, who communicate with the center by walkie-talkie. The central command had to be consulted before we were let out of the silo, at the opposite end from which we had entered it, out onto the open compound, to walk a hundred fifty yards to the small, isolated, windowless fort-within-a-fort, where the condemned go before stepping conveniently into the far end of the same building, to sit down in the electric chair.

Again, radio control confirmed Captain Malkin's instructions to open the door, and it creaked open, admitting a ray of daylight for the briefest moment, visible to the first three or four of the double-decker cells. Naked light bulbs hung overhead, and three television sets were blaring in the corridor, one for three prisoners, programs by majority vote, stations tuned in by the guards. I was led to the very end of the corridor, to within a few feet of the electric chair, from which I was separated by a metal door. On my right was Edgar H. Smith, Jr., who long since has broken the New Jersey record for the longest stay in the death cell—it is over eight years since he has seen daylight. I couldn't see him well, because in addition to the steel bars, they roll a steel screen that fits snugly over the entire front of the cell. I found myself wondering why it was necessary to exercise the Frisker on me. It was all I could do to see Smith. I could not have passed him a needle, even assuming Captain Malkin had nodded. I could, however, see clearly the dimensions of his cell, eight feet long, eight feet wide, nine feet high. Every Friday he steps out into the corridor, and takes a shower under a naked spigot; once a month, he steps out into the corridor for a haircut. I commiserated with him once. *"I appreciate your thoughts about my lack of exercise. It isn't all that bad. I walk a lot, like the pussycats in the zoo."*

He spoke for an hour—careful, though not overly so, not to touch on "the case," which it was Captain Malkin's duty to see that we didn't. We spoke about future appeals. He explained to me in some detail what his present legal situation was and how he hoped, ultimately, to force the courts to grant him a retrial. I found myself, for the hundreth time, marveling at the discipline of his thought. His voice betrayed a background of football lockers and poolrooms and beer taverns, faintly coarse, utterly inconsistent with his writing style, which is Victorian to the point of prudery. (*"Damn!"* he wrote on hearing my wife had broken her leg a few weeks earlier. *"What bad luck!"*) He had never finished high school, going instead into the Marines, where he served as a paratrooper and was discharged before his tour of duty was over because of a slight deafness in one ear. He was eleven when his mother and father were divorced, and was brought up by his devoted mother and his stepfather. At fourteen, he had got into trouble. A ten-year-old girl complained that he had fooled with her. He denied having done so, and the girl apparently had a querulous record. The judge, generally unconvinced, put young Edgar on probation for three years, and never received any further complaint against him. His mother sent him, as a day student, to a Catholic boarding school nearby, which Smith left after two years because the school committed the unpardonable sin of abolishing football, to which, above all other things, Smith was committed. He went to a public school, but left before his senior year, to join the Marines.

On getting out of the service he drifted from job to job, a leading member of the fresh set, taking and leaving jobs every few weeks or months. When he married, he bought a trailer. And when he ran out of money, he sold the trailer's wheels—even though they, as part of the trailer, were derivatively mortgaged. Mr. A. D. Nicol, a private investigator from Hackensack who was retained by Smith's mother until her savings were exhausted (he worked thereafter, and continues to work today, eight years later, free of charge: tirelessly running down leads), could only come up with three people, of the hundreds he interviewed, who thought that Smith, notwithstanding his diffuse impulsiveness, could be capable of an act of violence. Two of the three—a taxi driver, and a station attendant—didn't know him well. The third, Don Hommell, was the man Smith swears he left the girl with on the evening of March 4, 1957, a few minutes before nine at night, twelve hours before she was discovered, sixty feet away, just beyond the profile of the sandpit, her brains splattered about by a fourteen-pound boulder.

I was listening to an almost forbiddingly technical analysis of his legal situation, and it was a full half hour before I got the gist of it. Smith has become if not a finished lawyer—that takes experience—an extraordinarily resourceful and ingenious one, whose most recent appeal was described by Judge O'Dea as having been drafted with the "consummate skill of a seasoned practitioner." For eighteen months Smith had been conducting his own legal defense, filing briefs forty and fifty pages long, which had been typed by a fellow prisoner, and submitted to the Courts in *forma pauperis*. He had exhausted the philanthropic reserves of a lawyer who had taken his case, unsuccessfully, to the Supreme Court, and for a while had submitted to a lawyer designated by the Court. After a few months with him, Smith, dissatisfied, fired him—only to have him refuse to withdraw, leaving Smith in a most unusual state of virtual speechlessness. [The lawyer] "*has flatly refused to retire from my case. He said he would go ahead and argue the appeal on May 18.*

I will press him to withdraw and make certain he does. Can you imagine a lawyer saying he would not be dismissed? .It all adds up to the aroma I detected when he was appointed.''

My monitor was getting restless, and I got up to go. We said good-bye and I started down the corridor; when suddenly my escort drew aside to talk to a guard, leaving me directly opposite the elderly prisoner whose cell is adjacent to Smith's. ''Hello, Mr. Buckley,'' he said (the prisoners know the names of other prisoners' visitors). ''Hello,'' I said, not quite knowing how to take the conversation from there. ''Whom did *you* kill?'' seemed inappropriate. But so was any talk about the weather, the weather being as far removed from the notice of men living in solitary confinement, without windows, as the fluctuations of the stock market. We smiled nervously at each other; Captain Malkin rejoined me. I bade good-bye to Smith's neighbor, and walked out. As we went back across the compound toward the fortified silo, Captain Malkin explained that most of the prisoners in the death cell are quickly abandoned even by their own families. ''Edgar's wife used to come regularly for a couple of years. Then she went off, married someone else. She doesn't even write him any more. But his mother never misses.'' I said good-bye to the Warden. ''Smith seems quite confident he'll leave here one of these days,'' I observed chattily. ''Well, that's a safe prediction,'' he chuckled. ''He'll leave here one way or another.''

''I do wish,'' Smith wrote, *''our visit could have been longer, and free of restrictions. Perhaps someday we will be able to sit down and have a long talk, without worrying about any regulations. How about adopting me? You could then be on my regular family visiting list!* That *would go over big with Judge O'Dea!''*

In his opening remarks to the jury on May 15, 1957, Guy Calissi, the skilled chief prosecutor of Bergen County, outlined what the State intended to prove Edgar Smith had done. The State's theory of the case was that Smith had picked up Victoria Zielinski, driven to the sandpit with her, tried to make love to her; that she had become frightened and run away; that he grabbed a baseball bat, chased after her down the sandpit and onto Fardale Avenue, hit her with the bat, thrown it away, brought her (why?) back to the sandpit, carried her up a mound, and there killed her with a heavy boulder.

It took the Prosecutor five days to introduce the evidence to back up the theory. On the afternoon of March 4, 1957, Smith went bowling with two friends, Charles Rockefeller and Joe Gilroy. While bowling, Smith injured his ankle, an injury that was to prove relevant. After the game, Smith asked Gilroy if he could borrow his car to fetch some kerosene for the stove in his trailer home. After lighting the stove, he promised he would rejoin Gilroy and together they would have a few beers.

At eighty-twenty, Smith arrived at Secors gas station to buy the kerosene. He filled a five-gallon can, talked to a man whose car was having ignition trouble, and left.

Two witnesses testified that the time was about eight-thirty.

One hour before Smith left the gas station, the flirtatious Vickie Zielinski had gone out the door of her unsavory (to judge from subsequent divorce testimony) home. She had a test coming up the next morning at Ramsey High School and wanted to prepare for it with her friend Barbara Nixon. Vickie was afraid to walk alone at night, so her younger sister Myrna went with her halfway. (Strange. The younger sister then had to retread, alone, the same path her older sister had feared to take alone.) One hour later, at eight-thirty, Vickie said good night to Barbara and started walking home. As agreed, Myrna again left her house, at eight-forty, to meet her sister halfway and escort her home.

The State introduced at trial the statement Smith had given fourteen hours after being picked up.

He was on his way home with the kerosene—Smith said—when Vickie hailed him. He knew her only casually, but stopped to pick her up. The time was eight-thirty-seven or eight-forty.

When she got into the car, he said, she asked him not to drive her home by the direct route, because her sister was walking to meet her, and must not be allowed to see her in a car alone with a boy. At her suggestion, Smith said, he drove into a sandpit, a local lovers' lane, about two miles away, toward the ends of a loop that reached to within a half mile of Smith's own trailer. He parked the car. Vickie was talking to him about school. He lit a cigarette and let her drone on. Suddenly—and, Smith said to the police, without provocation—Vickie announced she was going to walk home by herself, and jeered at him, "I'm going to tell my father you're just like the other boys." (There are obvious implausibilities in this story, which become apparent in connection with the contradictory account Smith gave at the trial.)

Smith feared disagreeable consequences, he said, and tried to keep her from getting out of the car. She struggled. He hit her "a good one" with his hand. His memory of ensuing events, he then told the police, failed; but he vaguely remembered running somewhere. Eventually, he climbed back into his car and drove home. He remembered stopping, a hundred yards or so from the sandpit, on the road home to his trailer, alongside a Christmas tree he had planted some months before; but he wasn't sure why he stopped there, or what he did there. (The police searched the area and found Vickie's schoolbooks and wallet.) His right foot felt cold, and he noticed that he had lost his shoe (which had not been laced up, because of the ankle injury).

He reached home. Before entering the trailer, he had removed his pants because he saw that they were bloodstained. He told his wife he had got sick over them and discarded them. He filled the kerosene tank outside the trailer and then attempted, and failed, to light the stove. The night being especially cold (22°), he and his wife decided they would spend the night with her mother in Ridgewood.

He went outdoors to a pay telephone and called Gilroy. (The time of his call was nine-ten, Gilroy testified.) Smith told him he had been sick and didn't want to drink beer after all, that he hadn't been able to light the stove, and would therefore take the family to sleep elsewhere. Would Gilroy drive them to Ridgewood? He agreed.

Smith set out alone to pick up Gilroy, having informed his wife they'd be back shortly to drive together to Ridgewood. He went directly to the nearby sandpit to retrieve the lost shoe. He must have left the sandpit by nine-thirty at the latest to have arrived at Gilroy's at nine-forty. On the way he dumped his bloodied pants—just where, he told the police, he didn't remember. They drove together back to the trailer, picked up his wife and child, and arrived at Ridgewood at ten-fifteen.

Meanwhile, Myrna had walked all the way to the Nixon home, only to learn that Vickie had left on schedule. She and her mother waited up until midnight, then woke Mr. Zielinski. He and a third daughter drove around for two hours looking for Vickie. The next morning they renewed the search. Driving along Fardale Avenue they saw Vickie's scarf and shoe. Mrs. Zielinski went into the adjacent house to telephone the police. Zielinski walked a hundred yards down Fardale Avenue, where the road petered out into the sandpit. He saw there, at the crest of the gravel road close to the spot where Smith's car had been parked, his daughter's bloodstained gloves, lying on the road; but ignored them because, he said, he did not recognize them as belonging to Vickie. He turned and walked back to where the scarf and shoe had been found, by which time the police arrived. He and a policeman walked back to the sandpit. The policeman noticed the gloves, and they continued the search. They discovered the brains sixty feet away, whereupon Zielinski spotted the corpse. He called out to his wife that he had found her.

Vickie, the coroner reported, had been wearing boys' blue jeans. The fly was secure; she was wearing "immaculate" white panties; and was *virgo intacta.* Her sweater had been pulled up and her bra yanked down. Small bruises were found on her which the coroner said were tooth marks. Cause of death, which was declared to have been instantaneous, was the total crushing of the skull. The coroner, at the trial, fixed the time at midnight March 4, "give or take an hour."

That afternoon Gilroy ran into Donald Hommell, a friend of Vickie and also of Smith, at their favorite hangout, Tony's Amoco Station. Gilroy told him he was on his way to pick up Smith at his mother-in-law's. Hommell suggested they drive over in his car, rather than Gilroy's. When they arrived, Smith came out with wife and baggage and asked whether "the murdered girl" was Vickie—he said he had heard radio broadcasts reporting the murder (details unspecified) of "Victoria" Zielinski. Hommell said, "Yeah," and, with a wink at Gilroy—"the cops know from the tire tracks the make of the killer's car and are checking all the Mercurys in Bergen County."

Smith, according to Gilroy, paled visibly.

Recalling the incident, Smith subsequently told the police, "That's when it hit me really hard I must have been the one who really did it." He meant by that, he said at the trial, that the initial blow he had given Vickie, he thought, might have caused her, unattended, to bleed to death.

Driving along in Hommell's car, someone (just who is disputed) found a lipstick and passed it to Hommell—who had often dated Vickie—saying, "Maybe this is Vickie's?" Hommell said "No,"-and tossed it out the window.

Later that afternoon, Gilroy discovered two stains in his car—one on the left front seat, which was later identified as type "O" blood (Smith's blood is A, Vickie's was O)—and one on the right side of the transmission hump, which turned out to be kerosene. He recalled that Smith had told him about throwing away his pants because he got sick over them. Recalling that he had paled when Hommell mentioned the tire tracks, Gilroy went to the police.

The police picked Smith up for questioning at eleven-thirty that same night, shortly after he had gone to sleep. Under prolonged questioning he finally broke down. It was shortly after noon the next day that he gave the police the statement described above. He led the police to a garbage can where he had thrown away his shoes (which were stained with type O blood). He was not at any point during the prolonged questioning advised that he was entitled to the advice of counsel.

His pants were found by the police, though not at the spot he said he had left them, with his socks rolled up. They were found later near his mother's home, the pants spread out conspicuously, the socks stuffed in the pants' pockets. They were stained in the lower leg area with type O blood. Two months later, the baseball bat was found—in the woods, a hundred sixty feet from where the scarf and shoe, and hank of Vickie's hair—had been found.

The State depended heavily on Smith's statement—notwithstanding his denial that he had ever bashed a rock against Vickie's head. How could Smith explain it away?

To begin with, he gave it under extreme pressure. One of three judges in the U.S. Court of Appeals voted to give Smith a retrial in 1963, after reflecting on the circumstances.

The stark facts (said the judge) are that from 8:00 a.m. on the morning of March 5, 1957, until 3:45 p.m. on March

6, 1957—almost thirty-two hours—the appellant had no sleep with the exception of a couple of hours before he was taken from his bed and placed in custody at 11:30 p.m. on March 5; that he was interrogated in relays by prosecutors and their aides, local police and county detectives, as many as seven being present at one time, all through the night, relieved only by his being taken to various places in freezing weather with only a T-shirt on . . .; that he was given a light breakfast, stripped, and examined by a doctor and questioned repeatedly until 10:00 a.m. on March 6, when he broke down completely and cried and asked for a Catholic priest. . . .

Smith subsequently tried to release the priest from his confessional vow, and asked that he be sworn and testify to what Smith had said to him. But no one can release a priest from his confessional vow; and the priest declined to take the stand. Smith asked that a truth-serum test be administered. The State agreed, and psychiatrists were brought in. Under the influence of sodium amytal Smith babbled on and answered instantly and unambiguously all the questions he was asked. Although he made statements damaging to himself—yes, he admitted, he had tried to seduce Vickie—he said firmly and repeatedly that he had *not* killed her. The tape, for reasons unknown, was erased, and the psychiatrists' notes were not ruled admissible at the trial.

Smith swore he had, from exhaustion and pressure, invented the entire disjointed story he had given to the police, "not thinking anyone would believe it." Now, at the trial, he gave a very different story. Yes, he had picked Vickie up at eight-thirty or eight-forty, and yes, she told him not to drive straight home because her sister must not see her in the car alone with a boy. (An implausible story, though it was not contested at trial. Surely Vickie would get into greater trouble at home by letting Myrna walk all the way to the Nixons and back without Vickie, than by letting her sister see her in a car?) Vickie, he said, told him, on hailing him, that she had something she *must* tell him.

They arrived at the sandpit at about eight-forty-five. Smith now said that Vickie told him his wife was playing around with another man; that he became enraged, slapped her hard on the face, and told her to walk home. She opened the door of the car, went out and ran down the road. Smith paused a few moments, then started to back out of the pit. But he heard "a commotion" down at the corner, and discerned Vickie returning, with another man. Smith grabbed a baseball bat from the back seat, to be used if necessary "for protection." When the couple came closer, he saw that Vickie was leaning weakly against Don Hommell, bleeding from a scalp wound. Smith offered to take her to a doctor and she got into the car. Hommell, in a rage, dragged her from the car across the passenger's seat, and her head fell against Smith's pants. (Her gloves, if they came off at that moment, fell exactly where they were subsequently found.) Hommell, said Smith, was renowned for his violent temper, and considered Vickie his girl; so, Smith said, without further argument he drove home.

Later, on his way to pick up Gilroy, Smith continued, he spotted Hommell parked in downtown Ramsey. He pulled up and asked how Vickie was. "Don't worry about her," Hommell said; adding, "If you mention my name or in any way implicate me, I'm going to get your wife and baby." It was because of this threat against his family, Smith told the jury, that he invented the particular story he gave to the police.

Hommell swore he had not seen either Smith or Vickie on the night of the murder. He flatly denied Smith's claim that Vickie had been his girl friend. But under cross-examination he admitted having been out with her on ten different occasions.

Smith's story was roundly denounced at the trial by the prosecutor. If Smith had been scared of Hommell, why, when brought in by the police, had he said, "If you want a fall guy, why don't you get Donald Hommell?"

Smith's defense at trial concentrated less on Smith's own disavowal of his earlier statement to the police than on certain objective difficulties in the prosecutor's case. Outstanding of these was the coroner's evidence. If one is to believe the State's own expert, who fixed the time of death (instantaneous) at midnight—"give or take an hour"—and the evidence that Smith was at the sandpit not later than nine-thirty (as regards which there were abundant witnesses), then as a matter of fact he simply could not have killed the girl.

Judge O'Dea, however, held that the exact time of death was hard to fix, and that the jury could, in effect, make up its own mind when the murder happened. To the relief of the prosecution, the coroner came back in to say that death "might" have been earlier because the coldness of the night would have distorted his original analysis. Smith's lawyer neglected to ask "how much earlier." Even one hour earlier—ten p.m.—Smith still couldn't have done it. Ought the coroner to have testified that Vickie died at midnight, "give or take three hours"? What are coroners for, if not to be precise? Stomach-content analysis had not been made; else the time of death might have been conclusively established. The jury evidently decided that the doctor (although he had performed hundreds of autopsies) wasn't to be taken literally when, originally, he placed the murder about midnight.

Another difficulty. It was conceded that Smith could not have picked up Vickie before eight-thirty-five at the earliest. It took him a few minutes to drive to the sandpit, just how long is disputed (the distance is two miles; it took me seven minutes to drive the distance; the road is tortuous). Smith claims he did not arrive before eight-forty-five because a bulldozer doing road work temporarily blocked the road. This allegation could have been checked and contradicted by the State. The State did not do so, which means that under the rules of evidence, the burden of proof being the State's, it must be accepted as true.

Smith never deviated from his claim to have arrived home before nine, a claim backed up by his wife. He certainly could have not arrived much later than that, because he telephoned Gilroy's house at nine-ten, after removing a pair of pants, putting on another pair, going out to the kerosene tank, climbing up on the fence, filling the tank, and tinkering with the stove. In order to reach the trailer by nine, he had to leave the sandpit by eight-fifty-five. The State's charge is, in effect, that in the space of fifteen minutes—eight-forty-eight—fifty-five—Smith: 1) chatted with Vickie, 2) tried to make love to her, 3) progressed sufficiently far to leave tooth marks on her breast, 4) frightened her, 5) pursued her 334 feet down the road, bad ankle and all, 6) cut her head open with a baseball bat, 7) tossed the bat away a distance of 160 feet, 8) brought her 364 feet back to the sandpit, 9) dragged her up to the top of the mound sixty feet away, and 10) killed her with repeated blows from a heavy boulder. Aside from the extraordinary dispatch with which all this would have had to occur even if it had been carefully rehearsed by both parties, the question does arise: doesn't it strain the bounds of credibility that an essentially phlegmatic young man, of nonviolent habits, would so far lose control of himself, in the space of a minute or two, as to murder under such circumstances a fifteen-year-old girl he hardly knew?

Another objective problem not raised at the trial becomes apparent from a close examination of the situation. The blood-soaked scarf and hank of hair were found 360 feet from the body. The hank of hair was small, but large enough to suggest a scalp wound that must have bled profusely. Yet there was no trail of blood from that point back to where the body lay, 360 feet away over frozen ground that was carefully examined by numerous policemen. That means the killer either carried her fastidiously from Fardale Avenue to the sandpit in such fashion as to leave no blood on the road; or that she was hauled away in a car. Vickie weighed 120 pounds, Smith 150; so that it is unlikely that he would have elected to carry her that distance. (Remember: he was in no hurry. If he returned to the trailer at nine-thirty or ten-thirty, it would not have made any particular difference to a soul.) He would presumably have used the car. Why were there no bloodstains on the right front seat? Or in the back? Or trunk? Or other than on his pants legs? And anyway, if he had to run back to fetch the car, just how far can one stretch the distance a man can travel, or the number of things he can do, in a period of fifteen minutes?

Another item overlooked at the trial was Vickie's clothes, which were shot through with minute bone chips. The killer had to stand very close to her to use a fourteen-pound boulder so accurately. Small bone chips are highly tenacious. A careful examination of Smith's clothing failed to reveal any bone chips whatsoever.

As regards the state of Vickie's clothing, the State was successful in imposing on the jury a logical fallacy. Vickie's sweater was hauled up, and her bra pulled down. But the State insisted that Vickie had run a long way before her initial injury. If Smith had pulled up her sweater in the car, as alleged, two or three running steps, let alone the hundred steps required to take her to the spot where she was allegedly caught by Smith with a baseball bat, would have been enough to drop a loose cardigan back into position (the buttons of her sweater were still done up). Vickie's disarranged clothing suggests that she struggled with her assailant immediately before she died. The State did not allege any such thing. The timetable, stretched already to the breaking point, hardly permitted a twilight struggle at the top of the mound.

No significance was attached at the trial to the location of the bloodstained gloves, discovered sixty-one feet from the body. There is no apparent reason for the killer to have taken them off the corpse and placed them on the road. Presumably, then, the blood on the gloves came from Vickie's scalp wound. She must have tried to stanch the flow of blood with the gloves. Smith said at the trial that he saw her returning with Hommell. The point at which Hommell allegedly dragged her from the car is in the immediate vicinity of the point where the gloves were in fact found—the gloves could, as noted, have been yanked off her hands while Hommell was pulling her from the car. If Smith had clobbered Vickie with a baseball bat on Fardale Avenue as alleged, it is unlikely that she would have been in condition to stanch the flow of blood with her gloves. The gloves tend to corroborate Smith's otherwise implausible story.

Smith said he told Hommell during their brief conversation in Ramsey on the night of the murder just where he had discarded his pants. The woman who occupies property across the road from which Smith claimed to have thrown the pants (beside a bridge, halfway between the murder site and the trailer camp) swore at the trial that she had seen Hommell rummaging there the day after the murder. The pants were later found spread out near a well-traveled road, a hundred yards away from Smith's mother's house. Did Hommell find them, and leave them in the other location, thinking to discredit Smith's story, and make sure they would turn up? If the witness was correct (and she identified Hommell in the courtroom), then Smith's story about talking to Hommell on the night of the murder is proved, since Hommell otherwise would have had no reason to be there.

Hommell was absent from the pharmacy where he worked at the time Smith was at the sandpit, and was seen by—and acknowledges having seen—Myrna Zielinski driving at "about sixty miles an hour" shortly after nine. Yet Hommell later said he was at Pelzer's Tavern (five miles away) at nine-fifteen and that he was seen there by Pelzer or his wife and another member of the Smith set, Charles Rockefeller. After the trial, after Smith had been convicted, Pelzer executed an affidavit to the effect that he had obliged Hommell by saying he had seen him there at the critical period; that actually Hommell hadn't been there at all. In a subsequent affidavit, Pelzer said that Rockefeller was not at the tavern when Hommell said he was, that Rockefeller left at seven-thirty that night and did not return.

New Jersey law provides that first-degree murder must either be "premeditated killing" or felony murder. The State tried to get around the question of murder by charging Smith with a felony murder. But Judge O'Dea ruled this argument out, on the grounds that the condition of Vickie's clothing, and her physical condition as disclosed by the autopsy, ruled out a hypothesis of attempted rape.

That left only premeditated murder, to justify a first-degree conviction and the electric chair. It is incorrect, in legal terms, to suppose that premeditated murder is only the kind of thing Oswald was guilty of—ordering the rifle months ahead of time, studying the vicitim's itinerary, and lining up the circumstances for maximum convenience. According to New Jersey law, one can theoretically intend a murder in one second, and commit it the next ("No length of time need intervene between formation of the purpose to kill, and its execution"). One crucial distinction appears to be murder as a reflex action: murder in self-defense would be the most obvious case in point. Less obvious, but still generally classified as an unpremeditated murder, is murder in response to provocation by the victim irresistible to the man provoked. The provocation in question must be offensive rather than defensive. If a gentleman tries to seduce a lady, and she declines to go along, that is not a provocation which justifies him in killing her other than at the risk of conviction for a premeditated murder. If, however, the lady suggests the gentleman has been cuckolded, that is a provocative statement, and any lethal reply by the gentleman—in a fit of blind rage—may be classified as murder in the second degree. The jury was not invited to ponder these distinctions. Felony murder having been ruled out, the jury had to know that it was not the case that Smith had been provoked into insane action. Assuming he had actually killed the girl: is it more reasonable that he did so unprovoked than provoked? Murder resulting from a "wrongful act or insult" is a mandatory second-degree murder. Under the law, any doubt as regards the question inures to the benefit of the defendant. In which case the jury could have found him guilty in the second degree, and he would have received a life sentence. They found him guilty of a premeditated murder of Vickie Zielinski, by simply "inferring" intent "from the nature of the mortal blow," after a mere two hours of deliberation on an extraordinary complex case that had lasted two weeks.

Smith settled down at the Death House to initiate a series of appeals, all of which have been unsuccessful—except those that asked for a stay of execution pending the adjudication of the incumbent appeal. The first appeals concentrated on discrepancies uncovered in the evidence given at the trial: for instance, Pelzer's *volte face* on the question of Hommell's alibi. Denied. Gradually, Smith turned to matters of law rather than fact. So much so as to dismay some of his friends, a diminishing band~~, who would have~~ preferred, somehow, to see him devote his long weeks and years in the death cell to constructing a compelling case against the killer—whoever he was. (Early in our correspondence I raised the question. *"You say in your letter,"* he replied, *"that I am convinced of my innocence and, under the circumstances, I must have 'a strong case against somebody?' You end this statement with a question* *mark. I am not sure of your meaning. As for my innocence, it is not a matter of 'convincing' myself, I know!!")* But Smith turned cool; cool especially on the matter of putting his finger on the killer.

And, within a very short period, he was left with very few friends. His mother emptied her purse in his behalf, and could no longer pay legal or investigative bills. A. D. Nicol, the private eye, was paid $100 a week during the eleven weeks preceding the trial. Convinced of Smith's innocence, he never stopped working for him. Nicol is a middle-aged Scotsman, a prodigious worker addicted to meticulous detail, who drove four thousand miles merely to interview people who had known Smith. He took the job, as did Smith's trial attorney, believing Smith to be guilty, but believing also that he was entitled to representation. Within a very short period, they both believed him innocent. Nicol is a diffident man, noncombative in his views. Even so, after the conviction, in a conversation with the prosecutor, he listened to Mr. Calissi say: "I would stake my own life that Edgar Smith is guilty."

"I would like to say, with all due respect," Nicol said, "that I would stake mine that he wasn't guilty." His mind has never ceased to turn on the subject. He is by no means convinced that Hommell was the murderer; and as recently as the late Spring of 1965, he bared to me his own hypothesis, which only the laws of libel prevent my disclosing. He does believe that Smith last saw Vickie with Hommell.

In short order, the dramatis personae disbanded. Smith's wife went West with her new husband, and renamed her child. Mrs. Zielinski, Vickie's mother, divorced Zielinski, charging him wth unspeakable conduct and brutality toward her and her daughters. Hommell took odd jobs. A year ago he was extradited in Florida, after the American Civil Liberties Union took the complaints of fifteen boys at a Maryland Reformatory who charged Hommell with brutal and sadistic treatment of them. Characteristically, Smith gave me that information by sending along a clipping from a New Jersey paper without comment. I replied that the arrest was of considerable interest, even though, in conversations with Nicol, I gathered that he himself was not convinced of Hommell's guilt. *"No,"* Smith replied, advancing one of his measured thoughts, *"Nicol did not think Hommell was guilty. Then again, no one ever said he was guilty; the only thing I said was that I left the girl with him. As for Hommell's present troubles, I think they are more interesting than useful. Being entirely realistic about things, I would suppose that the only real value to me of Hommell's difficulties would be if a new trial were granted; then I could very well raise hell on the question of Hommell's credibility as a witness for the prosecution. (Wow! What a great title for a book or a play—* Witness For the Prosecution. *Such imagination!)"*

Smith's letters are obstinately optimistic concerning his ultimate vindication—at least legally (he never talks about getting his hands on The Killer; or at least not to me.) His imperturbability, a word he has come to dislike, I found out after twice using it, is sometimes understandable, sometimes less so. (July 26, 1963:) *"It is my sad task,"* he began a letter in a style so often arch, *"to advise you of the denial of my appeal. The denial came on 24 July* [*1963*] *via a 2-1 vote."* But quickly the note of optimism. *"However, for the first time, a Judge saw things my way."* He tried a little later (November 4) to persuade his former wife, through a volunteer attorney out West, to execute an affidavit reconfirming the facts on the record—that the police had pretended to her, on the morning of March 6, that Smith was being detained merely to answer questions concerning another suspect, and that therefore she did not need to worry, as she was disposed to do, to summon an attorney in his behalf. But his wife now pretended she had never before heard of Edgar Smith; before the affidavit could be presented, she invited the attorney, curtly, to leave her house. *"The information* [from out West], *unfortunately,* *was not what I would have liked to have heard. I suppose it's best to be philosophic about my problems, when one gets to the bottom of the ladder the only way to go is up. You can believe''*—a rare relapse into melancholy—*''I have now reached the bottom.''*[*]

And then the rejection by the Supreme Court (February 20). *''From what I hear from Washington, Justice Douglas voted to give me a full hearing. Four votes are needed. Apparently Justice Douglas was the only one to see things my way. Bless his liberal heart!!''*

And on the 25th of March, when a colleague of mine expressed concern over an execution date fixed for the 27th of April: *''Don't worry about that April 27 date, a stay is more or less a formality.''* And changing the subject quickly to more serious matters: *''Do me a favor, will you? Call me something besides Mr. Smith; no one else does except Mr. Buckley. Maybe there's some psychological significance, but I feel uncomfortable when people call me Mr. Smith. I prefer anything else, Ed, Smitty, even Edgar. To what might be called the in-group, I answer most often to Igor.''*

(On July 7th:) *''I have just learned that the State Supreme Court has rejected my appeal. Again, I am surprised!''* (Smithese for: I am not surprised.) *''Perhaps by the time you return from celebrating Barry Goldwater's victory in San Francisco, I will be able to give you a positive statement as to my future plans.''* On July 13th, his buoyancy was visibly diminished, though finally it surfaced. *''I have received the New Jersey Supreme Court opinion on my last appeal; it is even more abrupt than I had expected it to be. I was surprised by the Court's reliance on inference and supposition—all in the State's favor. I have, in the past, been willing to accept the various Court*

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[*] **The former Mrs. Smith has since executed an affidavit tending to confirm the facts as alleged by Edgar Smith.**

decisions with a reasonable degree of equanimity; this time I find I am rather unhappy. However, what is done is done.''

For a year, he believed that the Supreme Court's decision in *Mapp vs Ohio,* which defined the rules of search and seizure in such a way as to flatly illegalize the means by which the State of New Jersey had got evidence from Smith concerning the baseball bat, the pants, and Vickie's school books, would be his deliverance. The question was whether the Supreme Court would rule that its decision in *Mapp* should apply retroactively, i.e., that prisoners whose plight was traceable to a violation of these rules should be given a retrial. Smith was jubilantly confident that the Supreme Court would so rule in the Spring of 1965—and confident that the New Jersey prosecutor was ignorant that the Supreme Court had accepted two test cases which would require it to come to a decision on the matter.

Nothing doing. (June 9:) *''I would suppose you* [*have*] *read that the Supreme Court has held Mapp to be non-retroactive. They really surprised everyone this time. It makes my problem somewhat more difficult, but I've managed to survive worse setbacks.''*

His optimism sometimes has stemmed from his confidence in his own superior knowledge if not of the law, at least of legal tactics. To his dumb amazement, on one occasion the State missed its deadline for filing a brief in opposition to his own. The rules on the matter are very strict—if no brief in opposition is filed, a Court is entitled to take the position that the petitioner's point is unopposed, in which case it is, as a rule, automatically conceded. An entire month went by. *''The State filed, without explanation, a reply brief on January 21, one month late. I filed a Motion the same day, calling for rejection of the reply* [*on the grounds of its lateness*]. *Actually, it might be better in the long run if the reply is accepted. My humble opinion is that the reply is the worst brief I have ever seen.''*

The Supreme Court, once again, turned him down. (February 3:) "*Throw me a parachute,*" he wrote me to Switzerland. "*—I've been shot down by the Warren Escadrille. The decision came Monday, the 1st.*" And then, like a composer facing an immense organ console, meditating the harmonic combination best suited for the next desired effect, "*It may take a few weeks to determine which way, legally speaking, I will go next. It appears that my best bet will be to hang up my appeal in some manner*"—he meant delaying action, for the sake of delay—"*in order to give the Supreme Court time to reach its decisions.*" (He was waiting for the Court to declare itself on the retroactive application of *Mapp.*) "*Of course, delaying actions aren't ethical—but, then again, I'm not a lawyer, am I? . . . Perhaps this would be a good time to ask the County Court to correct some of these minor errors in the record. . . .*"

By March 1st he had decided on his strategy, which he communicated shortly after writing that he had secured a Court order authorizing me to visit him. "*After a month or so of hard work, mostly trying to decipher Earl Warren's* [opinions], *I'm beginning to see a ray of hope. All I have to do now is to convince one of the lower courts that the Supreme Court means precisely what it says; if I can do that—no mean task—I may wind up visiting you.*"

On March 17, 1965, almost as if to interrupt Edgar Smith in mid thought, Judge O'Dea set an execution date—April 28. He appealed to the New Jersey Supreme Court to stay the execution, pending his appeal. The New Jersey Courts delayed. . . . At the last minute, Associate Justice Brennan of the Supreme Court ordered the stay of execution (which Smith sent me, marked "No need to return"). This time he had been visibly shaken.

(April 18:) "*My predicted schedule is a fait accompli. Mr. Justice Brennan ordered the stay of execution on Good Friday, which is in itself singularly appropriate. I will* *now sit back and bide my time until the end of the [Supreme Court's] term, the 21st of June. Then, with all the Court's decisions at hand [the Supreme Court makes some of its most important decisions at the end of its term, and was due to rule then on the applicability of Mapp], I will be able to file my petition on latest authority. That petition will be acted upon the first Monday in October. If the Court then declines to take jurisdiction, off I go to the District Court. All of which means you can keep aboard your boat, head for Nassau and the Out Islands, and forget about Young Smith for the next six months."*

He did not, as was his habit, sustain the levity:

"*Bill you know as well as anyone that I've never been one to grouse about the manner in which my case has been handled in the courts, but today I'm peeved. Back in 1958, my lawyers tried for two days to get a stay [of execution] from one of the State Courts, but couldn't even get the time of day. Finally, with twenty-four hours to go, they managed to find a Federal Judge to issue a stay and take jurisdiction away from the State Courts. Within an hour, the State Supreme Court and the Attorney-General both issued stays, claiming prior jurisdiction. The Federal Judge released the case to the State, after he had finished chewing out the Attorney-General for, as the Judge put it, 'playing games.' Well, 1965 was nearly a repeat performance.*

"*After filing in the State Court for a stay, I wrote the Chief Justice three letters, explaining the exigency of my situation and requesting a speedy decision. I waited eleven days for a decision usually made in one day, and then heard a story to the effect that the Court was going to sit on the application until the last possible moment, then deny it. So being prudent where my skin is involved, I wrote to the Court and the Attorney-General, telling them I'd wait three more days before asking the Federal Court to again take jurisdiction.* Mirabile dictu, *I received a decision the following day.*

"Frankly, my friend, things were a bit close for a while; I had the suspicion I was batting a sticky wicket. You can bet your best ski boot that the State isn't going to throw any parties for Justice Brennan this month.

" 'Tis time I ceased bending your ear. Will keep you posted, always and endlessly (one hopes)."

Edgar's mother gave me a picture less composed: "At the time I arrived for my visit [with Edgar] he did not know about the stay. It was my pleasure to tell him. He did not believe it was true until it came on the noon news."

Smith doesn't write only about his legal problems. In prison he has read as widely as his prior commitment to the law will permit him. He has taken correspondence courses from several universities, in several fields, and is also an avid television viewer. (*" 'Tis time for me to settle back for another evening of TV. Tonight is educational TV night, I watch the one and only* Beverly Hillbillies. *Late at night, eleven to one, I watch Johnny Carson."*) He spotted Dwight Macdonald one night, describing himself as a "conservative anarchist." *"Our 'conservative anarchist' is a real enigma. Perhaps some Sunday afternoon the Hayden Planetarium could devote a special show to attempting to depict the various seasonal positions of the stars in the liberal galaxy. . . ."* He takes a modest pride in his scholarly achievements. (December 8, 1963:) *"I thought you might care to know that I have taken and passed the first of two tests given by Mensa.* They advertise in the classified section of N.R. I am also carrying a ninety-eight percent average in the Accounting and Economics courses I am taking from Penn State University. I will complete the first semester in about three weeks."* And on another occasion (August 20, 1964): *"Thought you would be interested in my college grades to date. They are: Accounting 1 and 2, six semester hours,*

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* The organization of top I.Q.'ers.

final grade B; Business Organization, three hours, final grade B; European History (Renaissance to Waterloo), four hours, final grade A; Advanced Rhetoric (incomplete), three hours, A average. By the way, for my final exam in Rhetoric, I wrote an essay about BG [*Goldwater*] *and the press.*" And on January 5, 1965, acknowledging a book I sent him at Christmastime: "*. . . I guess I'm something of a nut on World War II. Once I get going with all the maps and things I withdraw from the world for days at a time. By the way, did you know that Kosygin was one of the planners of the industrial move to the East in 1941?*"

And sometimes, in his letters, just acute high-spiritedness. "*P.S..*" (July 22, 1964:) '"*I see* National Review *is now listing its zip-code number. A sign of moderation?*" (September 16:) *Yesterday I received* National Review. *Who had the bright idea for that section printed on blue paper? I almost went blind trying to read it. (Don't I have a lot of nerve for one who is receiving a free subscription?)*" I replied: "The blue paper was a catastrophe. The printer simply substituted his shade of blue for the blue we had designated. We are flatly refusing to pay them for the supplement, so that I may end up in jail myself. You would, of course, write to me?" And a reply: "*My opinion is that you'll have to pay for the blue paper. Being in interstate commerce, you cannot discriminate on the basis of color—including the various shades of blue. If you go to jail, I'll write—provided you maintain a modicum of imperturbability.*"

I thanked him, last December, for sending my wife the Museum of Modern Art's annual calendar. (December 18:) "*Glad you liked the calendar. I would have liked to have done more, but circumstances made it impossible. Perhaps I'll remember you in my will, and leave you my collection of* National Geographic *maps.*" I thought I saw a wayward trace of bitter-sadness here, and tried to move fast to cope with it, and lead it back to where it normally slumbered.

"Thank you for promising to remember me in your will [I replied]. Since I am ten years older than you and engaged in activities far more perilous than yours, with perhaps a single exception I should think it highly unlikely that I shall reap any such harvest. But I thank you for the thought." He did not acknowledge the letter, but several months later alluded to it. *"Good Lord!"* he began, with his conventional tushery. *"How did you get shanghaied into that election business?"* (I had declared my candidacy for Mayor of New York.) *"Did you ever stop to think that through some strange twist of fate you might be unlucky enough to win? It isn't likely, but the possibility is frightening. At least you have the editors of the* Times *pulling for you to come out safely in the end. As for myself, I'm almost afraid to send you a contribution —it might help. Oh well, if nothing else, I can now agree with you when you say you have as many problems as I do."* (June 25, 1965)

The final appeal of Edgar Smith will be based on three points. The first is that the proceedings by the police against him on March 5 and 6 were inquisitorial rather than accusatory: that inordinate pressures were put on him, so much so as to cause him to say anything at all rather than endure the agony of further questioning, further harassment, further fatigue. The second is that Smith was denied counsel at a moment when the proceedings had clearly progressed beyond the investigative point, on over to the accusatory point. The third is that incriminating information was got from him without regard to his rights under the Fifth Amendment.

The legal fight, provided the money can be raised to pay a lawyer's fee, will go, almost inevitably, to the Supreme Court: for the final time. The District Court will predictably have turned down Smith's appeal by the time these words appear in print. The Court of Appeals will hear Smith's appeal and dispose of it by Winter or Spring of 1966: probably unfavorably, considering the flux caused by recent Supreme Court decisions, and the conventional indisposition of a lower Court to apply Supreme Court rulings that are considered if not elusive, at any rate socially disruptive. If *Escobedo vs Illinois*, for instance, is to be applied retroactively, will our jails suddenly empty? And will new trials, some of them many years after the crime, need to be conducted? This spring the Third Circuit Court of Appeals, ruling on the prisoner Russo, who occupies the same Death House as Smith, took the bits and pieces of legal flotsam washing about in the legal seas and attempted to lay down a firm position. I asked Smith, at the same time, to explain to me the meaning of the Russo decision (which will be tested in the fall, with consequences for Smith, among others), and he wrote me as follows:

"*The Third Circuit decision at issue is a new and truly far-reaching holding only insofar as it represents a sort of amalgamation of all past State and Federal Court holdings. In combination, these holdings add up to far more than they do when considered separately. In all fairness to the Third Circuit, one must note that each statement in this recent decision is supported by a previous decision of some other court.*

"*The decision deals with two specific issues. The first is the factual question of when the right to counsel obtains; the second is the question of whether the right depends upon a request.*

"*1) The prevailing standard for judging the point at which a suspect becomes the accused, and the right to counsel thereby attaches, is Escobedo vs Illinois. In simplest terms, Escobedo holds that the right obtains when the crime is no longer 'unsolved,' when the suspect is in custody, and when he has not waived his right to counsel. This is a difficult series of circumstances for an appellate court to determine in retrospect; it might have been better to say 'when probable* [*prima facie?—W.F.B.*] *cause to arrest is present.' The problem of determining when the* *suspect becomes the 'accused' is akin to determining when a book or movie is 'obscene.' In both cases, everything depends upon the particular circumstances of a given situation.*

"Example: If the police have a confession from the suspect's partner, implicating the suspect, and there is independent evidence placing the suspect at the scene of the crime at the time of the crime; it may then be said that the crime has been solved, that the suspect has become the accused, and he is entitled to the assistance of counsel. This may not mean the police have sufficient evidence to convict, it simply means the police have probable cause to arrest; and that continued interrogation in the absence of counsel is impermissible, since the obvious purpose of that interrogation is to secure from the mouth of the accused the necessary evidence to convict. (Wretched phrasing!) Nothing prevents interrogation if the purpose is to solve a crime, and counsel at this stage is not a constitutionally secured right. However, when the interrogation is for the demonstrable purpose of eliciting a confession which will complement other evidence and assure a conviction, the constitutional right to counsel obtains. Finally, the police may interrogate any person at any time if that person has been advised by counsel, or has waived that right, and still wishes to 'bare his breast.'

"2) Having determined that the petitioner had become the accused, the Third Circuit turned to the question of whether their failure to request counsel militated against a finding that they had been deprived of counsel, and concluded that it did not. Citing the Supreme Court decision in Carnley vs. Cochran *(1939), and a host of subsequent Federal and State decisions, the Court came to the obvious conclusion that the right to counsel is secured by the Constitution, not by any request. If the accused has that right, it is his whether or not he has asked for it; if he does not have the right, a request does not give it to him. This par-*

ticular holding was taken from People vs. Dorado, *California Supreme Court, Jan. 18, 1965. The State appealed and the Supreme Court refused to review June 2, 1965. The Ohio Supreme Court ruled to the contrary but the United States Supreme Court reversed that decision May 24; 1965.*

"In all jurisdictions, the right to counsel may be waived. Many State Courts have considered silence to be a waiver, but this has never held up in the Federal Courts. The Federal Courts hold that the waiver must be knowing and intelligent, that to waive the right the suspect must know first that he has the right. Hence the recent holdings that police must advise suspects of their rights, and that any waiver must show that the suspect was fully aware of what a waiver would mean. For the Courts to hold otherwise would be to favor the habitual criminal over the first offender. The former 'knows the score' and is quick to request counsel; the latter is often confused, intimidated, or simply ignorant of his rights. Thus, in determining the intelligence of any alleged waiver, the suspect's prior record is a significant factor.

"Additionally, the Third Circuit Court reasoned that if a person has the constitutional right at trial, to counsel, notwithstanding his failure to request counsel, he should not be required to request counsel when the constitutional right obtains prior to trial. After all, why should a right depend upon a request at one time but not at another?

"I might add that many police officials argue that a 'warning' will prevent them from obtaining confessions from those suspects who desire to confess. This is ridiculous. If a suspect truly desires to confess, a warning will not stop him. On the other hand, if the confession is obtained solely because the suspect was ignorant of his rights and did not know he could remain silent, it should be thrown out. And this is what the Third Circuit has done.

"I could write a hell of a lot more, but it's getting late and I'm beat. Hope this rather sloppy and superficial rundown gives you some idea of what the decision was about. It's not Magna Carta, far from it, but it does help me."

It is only natural for laymen such as myself to wonder why a man who can write such expository paragraphs as these should need another man for a lawyer. One recalls, from time to time (without ever fully understanding it), the old saw about the man who serves as his own lawyer having a fool for a client. The key here is Experience! How very necessary it is; and it's something Smith does not have. *"Could you give me the benefit of your thinking, as to how I might best proceed,"* he asked me last March (March 28). *"I hate like hell to put you to a lot of trouble on my account, but I have to plan ahead. . . . Quite frankly, Counsellor Smith is in somewhat of a quandary. Do I compromise my not too abundant principles and prepare the abject, bowing and fawning type of brief the State Courts have come to expect (prefer?) from indigent lay appellants? Or do I stand by what I know is right ('In your heart . . .'), and give the Court a lecture on the State's basic responsibility to uphold and protect the federally secured rights of its citizens? The first course is wiser, the latter the more honest. It's quite a problem in strategy. If I had been trained at 'Foggy Bottom,' I'd probably try to walk a thin line down the middle, and wind up losing on both sides. Oh, for a return to the simple days of my misspent youth!"*

Smith never once asked me to help him raise the funds to retain a lawyer. Our single discussion of his needs centered on the purely mechanical problem of replacing an inadequate and slow prison typist with a professional legal stenographer accustomed to the proper typographical façade; and to the irksome problem of supplying the dozens and dozens of copies that need to be furnished when complicated appeals are filed. I have never known a less importunate man, for whom the least favor is taken as a charitable act of great magnitude. *"It is very kind of you people,"* he wrote a short time later, *"to take such an interest in my situation."* Much later, when I undertook to get his appeals typed and duplicated: *"I know you are going to suggest that you will have the work done for me. Please, humor me; I am just conservative enough to insist on paying my own way for as long as I can."* I replied that I would purchase the literary right to the letters he had sent me in return for the cost of duplicating his appeals. His next letter joked about the suggested deal. I persevered. He replied: *"No, I didn't refuse you the 'litprop' in my letters. All I did was deny that any existed, and I still deny it. You'll never realize how happy I am knowing that you have to read my letters, not I. That isn't an opening into which you are expected to insert a compliment. I'm being perfectly candid when I say I haven't been able to figure out what in hell there is about Smith that keeps you interested."*

What indeed? It has not occurred to him that one can develop a friendship for a man in a Death House; or that a condemned man's friendship can be gratefully accepted. Probably it has not occurred to him because probably he suspects that any such friendships are emotionally condescending, that they are based on pity, or morbidity. I suspect that that is the reason why his natural dignity has always prevented him from emotional self-revelation. Only twice has he exposed himself. I finished a letter about this and that (August 18, 1964) rather impulsively with the sentence, "My God, I wish I could be absolutely certain you didn't kill that girl!" *"My God,"* he replied, *"I wish you could be absolutely certain I didn't kill that girl!"*—but he recovered his composure before even finishing the sentence: *"But you know what they say about death and taxes. I think, for now, that I am satisfied that you aren't certain that I did kill her.*

Besides, you really think it would do any good for me to tell you I didn't? Would that convince you? Disclaimers of guilt are a dime a dozen around this place." And then he was Lawyer Smith again: *"From an idealistic (sic) point of view, if you are uncertain about my innocence, it follows that you must be uncertain about my guilt, as well, and I am entitled to the full benefit of your doubt. Where is your conservative belief in established judicial principles?"*

The other time I riled him, he did not recover until the end of a long paragraph. I had written him that God was apparently in the subways, to judge from graffiti I had come upon that morning. "God is Dead—Nietzsche," someone had written in chalk. Under which had been scrawled in block letters, "NIETZSCHE IS DEAD—GOD." I then made a second comment, coming apparently too close on the heels of the first, about his imperturbability. *"I had not intended to write again so soon,"* he began glacially, *"but I am, quite frankly, somewhat disturbed by your very apparent misapprehensions as to my state of mind. Your references to my serenity, imperturbability, etc., impute (sic) that I am some Buddha-like anachronism, fast approaching Nirvana. Tell me—does the fact that I am in the Death House mean to you that I should be perpetually atop a soapbox, shouting my protestations to a cold, cruel, unhearing world? I assure you, my friend, if I thought soapbox oratory would serve me any good purpose, I would climb onto the closest box handy, and put George Wallace to shame. The fact is that what you mistake for serenity, or an air of detachment, is nothing more or less than the realization on my part of the fact that my situation is not going to be improved by breast-beating and lamentations, however loud or sustained—it can only be changed by and in a court of law. Perhaps my letters should be appropriately tearstained when they arrive at your office, giving them a more pathetically desperate quality. Again, if it would* *do me any good, I would cry you a river—à la Julie London.''* Then, rapidly, the pulse slowed; and Queen Victoria remounted her throne. *''I trust you will not misinterpret the tone of this letter. I was not especially unhappy that you failed to understand my feelings, but I did think it was worth clearing up.*

''P.S. What ever were you doing in a New York subway? You're right, you do live more dangerously than I do—much more.'' †††

(Editor's Note: Edgar Smith has no funds to retain counsel, without which he cannot complete the final legal appeals that stand between him and the electric chair. A fund for this purpose has been started: donations should be earmarked ''Edgar Smith Fund'' and sent [immediately] to Mr. James Williams, Treasurer, New York Yearly Meeting of Friends, Oakwood School, Poughkeepsie, New York [a tax-deductible foundation]. Any surplus will be returned after the final disposition of the case. The author's fee for this article has been turned over to the fund.)

Excerpts From the Transcript of First Habeas Argument

TRANSCRIPT ON MOTION

Trenton, New Jersey
May 15, 1961

Before The Honorable Arthur S. Lane, USDJ

Appearances: William Richter and John E. Selser, for the Relator

William C. Brudnick, Special Assistant Prosecutor of Bergen County for the State

The Court: Mr. Richter and Mr. Brudnick, was it your intention today to just argue the motion of Mr. Brudnick for striking this amendment to the supplemental petition or do you intend—you have not answered this supplemental?

Mr. Brudnick: I have an answer prepared, sir.

Mr. Richter: It was my thought—I didn't know what the procedure would be—it was my thought, if your Honor pleases, to apply to your Honor before you hear the motion to strike it as out of order.

The Court: To strike the motion?

Mr. Richter: Yes. I was flabbergasted to receive it because I thought when we left your Honor's chambers I thought we were in complete accord and instead of Mr. Brudnick calling and asking for more time from May 15 to June 5, as your Honor had stipulated and we agreed to, this motion was served on me instead.

I don't want to go into the merits of the motion because I think, if I use the term false, I think I will be using a correct term. I would rather use the, I would rather say it is presumptuous. I think it is presumptuous on the Court, even, to have made the motion, and I think your Honor is well aware of what the stipulation was in your chambers that day, and as far as I am concerned, if this motion is ruled out of order, your Honor could either hear argument today or set it over to June 5. I am at your Honor's pleasure.

The Court: Let me say this. There may have been some misunderstanding on our last discussion, but it was my thought, and I think I initiated the idea that I didn't want counsel on the side of the defendant or the side of the State or anybody involved in this case feeling dissatisfied with the state of the record; that I wanted this record insofar as you gentlemen are concerned to be as complete as you thought it should be. I am not talking about the merits of any of the defenses or any of the points raised by either party. I am not talking about the merits. I just wanted everybody to be satisfied that they had, so far as they were concerned, this record in complete form so that here and later and wherever you may go, whoever takes the initiative of going from here to somewhere else would not be called upon to argue that this is incomplete and this matter really hasn't been heard as yet.

Now, that was my notion, and that is the (4) reason I think I suggested that I would allow an amended or supplemental petition, you see. I asked that it conform or follow the same format as your other petition so we wouldn't have criss-crossing and have to search back and forth, and so forth. I take it that you understood that was the plan.

Mr. Richter: Exactly, sir.

The Court: And you have attempted to follow that?

Mr. Richter: I might add it was your Honor's thought, and I agreed we should expedite this thing rather than start anew, that I had no objection to your Honor picking up where Judge Morrill left off, with the proviso I could amend the supplement and argue before your Honor, and your Honor agreed on that.

The Court: Do I understand this amended or supplemental petition supersedes everything else that you have by way of petition?

Mr. Richter: Yes, and follows the original petition exactly except for the Cassity notes, which have been added.

The Court: In other words so far as I am concerned I can rely on this as representing your (5) entire position?

Mr. Richter: Yes, sir, with the exception, I may say, of one exhibit which is in the original petition which concerns itself with New Jersey statutes. As a matter of fact, the original petition had application for a stay in it originally, but your Honor is absolutely right you may follow this amended supplemental petition as if it was filed anew.

The Court: Now, sir, you don't approve of that idea?

Mr. Brudnick: If I can be heard—

The Court: You may, sir.

Mr. Brudnick: On this, this is exactly what was attempted to be done when Judge Morrill was living. There was initially an application for stay, an application for habeas corpus in which everything that we now have was set forth. The defendant was then asked to file a designation of the record, because nowhere in the moving papers at the time of the application for habeas corpus was there any reference to any of the statements that were made there.

Hence, at the argument on the hearing for habeas corpus, this was pointed out, and Judge Morrill requested that a designation of the record be filed by the defendant and by the State.

The Court: Yes, sir.

Mr. Brudnick: Instead of a designation of the record there was filed something that was called some hybrid designation of the record and/or supplemental and/or amended petition, which consisted of 60 pages, and this is identical, except that he had deleted a couple of pages to which was attached an affidavit by Dr. Cassity, an affidavit by Dr. Policastro setting forth the truth serum tests and how there was a denial of his constitutional rights. Judge Morrill threw it out on his own volition.

He sent it back and said that he wouldn't take it because this was not a designation of the record.

Subsequently, the defendant then moved to supplement and/or amend his petitions which had been consolidated. . . .

* * * * * * * * * *

Mr. Richter: I don't think there is any point in answering this. (11)

The Court: We are in the home stretch now so far as the presentations, and then I will have the great big task of studying this whole matter and rendering a decision on it.

Now, if he isn't ready, if he wants an opportunity to study the answer you filed now before over-all argument, I will give it to him, and if you return on the 5th, we will have the oral argument, and in the meantime I will have done some work on this petition and your answer and on the record, and I am sure we will be quite a long way ahead of where we are today. . . .

* * * * * * * * * *

TRANSCRIPT OF MOTION

Trenton, New Jersey
June 5, 1961

Before The Honorable ARTHUR S. LANE, USDJ

(Appearances as before)

The Court: Before you start, it seems to me you have done quite a thorough job on these moving papers, and it would not be necessary for you to recite all that is here. I think that I would suggest that two or three of the points that you think are the most important, you might confine yourself to that.

Mr. Richter: I was thinking of doing that, Judge. I don't mean to make any formal argument, but what I would like to do, if it meets with your Honor's approval, is to sort of go through the petition and sort of discuss the thing with you and emphasize the points that I think need emphasis, and that was my intention.

The Court: Yes, sir.

Mr. Richter: Did your Honor want me to speak from here or approach the rostrum?

Judge, at the outset I should like to say that the last time I appeared in the Federal Court to argue the petition in this Edgar Smith matter was before the late Judge Morrill, a year and a half ago, and I should like now for the record to express our deep regret at his passing and for his Honor's due and serious consideration of the matter. I know that, and I know Mr. Hicks joins with me in those sentiments.

I should also say that Judge Morrill did not hold this case for a year and half. I realize that toward the end of his life he was in ill health, but I do understand and appreciate that for a substantial part of the year and a half I think he had given this matter due and serious consideration.

I also know that I believe—and he was awaiting the outcome of some cases from the United States Supreme Court, particularly the Rogers case, and Mr. Hicks here can verify that by saying at one time Judge Morrill had told him he was awaiting the outcome of the Rogers case because he thought it was quite parallel to the Smith case. I mention that to your Honor for what it may be worth.

I think at the last discussion in conference your Honor said that you had no confidential memorandum or notes from Judge Morrill and, unfortunately, his ideas and his thoughts and considerations in the matter passed on with him. So your Honor must take this matter pretty much from scratch, so to speak, and I appreciate your Honor permitting us to supplement and amend our petition so that your Honor will have all the facts before you, and it is a fortuitous decision, because it falls almost in line with what the Rogers case has said, and what the United

States Supreme Court has said is that your Honor should not be limited in any manner. As a matter of fact, your Honor should not have been limited by the trial record itself, because now by the Rogers case you have guidance and your Honor can go behind the record.

The United States Supreme Court says your Honor may hold a hearing de novo if need be to go into the historical facts behind this case. I don't think it is necessary here.

I think if your Honor limits himself to the record, I think that the error, the fundamental constitutional error in this case is so overwhelming that I need not stand here and argue this case at any great length.

Now, if we understand each other, so there will be no mistake about it, we rely solely and wholly upon this amendment and supplemental petition your Honor now has before you with the exceptions that I noted at my last appearance of Exhibit C attached to the original petition, which is the excerpts of the statutes, New Jersey Statutes, which concerns itself with the requirements as to arrest and arraignment, et cetera, and so forth. With that addition, I say we rely solely upon this amended and supplemental petition, and bearing that in mind, I now call your Honor's attention to the answer submitted by my learned adversary, and I know that your Honor has all these papers before you. You probably are familiar with the matter now.

The Answer is as weak as any answer I have ever seen to the petition which we have submitted to your Honor. It consists mainly of a general denial by the Prosecutor. He seems to content himself with a general denial to all that we have stated in our petition. . . .

* * * * * * * * * *

Mr. Richter: Yes. All right.

Now there is one other point I would like to bring in. Mr. Brudnick still says we are restricted to this trial record. I say we are not, and I say the Rogers case now agrees with us that this Court can go beyond the trial record and it says it very plain here. As a matter of fact, the Rogers case says even if we didn't raise the voluntariness of the confession in the trial court, we can raise it here for the first time and your Honor can hold a de novo proceeding on that assuming for the sake of argument that the lawyer failed to raise the issue of voluntariness in the trial court. Would they tell us that we can't raise it if it deprives this boy of his constitutional (89) rights, even here for the first time, which is not the case. I say it was raised there and your Honor will see the record, and even the State Supreme Court says they would treat it as if it were objected to on every conceivable legal ground.

And it says here on page 14 of the Rogers opinion that, of course, where the issue of coercion is raised, not on direct review in this court but by the petition for habeas corpus in the Federal district court, one alternative method of proceeding impossible on direct review is available. The district court might conceivably hold a hearing de novo on the issue of coercion. So I say that that can be raised here for the first time if need be, and that applies to the truth serum. And I say to your Honor even though it wasn't raised in the State court, if your Honor agrees with our contention that the use of this truth serum was unlawful and if they suppressed evidence in obtaining this truth serum examination, I say to your Honor we can raise it here for the first time and, if necessary, hold a hearing de novo, although the United States Supreme Court said your Honor should not have to do that if the (90) historical facts—and historical facts means what it says, historical facts don't mean in the trial record, it means the facts as they existed; if the historical facts bear out our contention, I say to your Honor that even without holding a de novo proceeding, you can send it back to the trial court and put it upon them, because the Court, the United States Supreme Court says that it is the State's responsibility. It is the responsibility of the trial court to protect this boy's legal and constitutional rights, and if they didn't do it, you don't have to do it at this late stage of the proceeding, but you can do it. And I say that is the Rogers case.

As far as truth serum is concerned, he is belittling the truth serum. There is a case now pending in the United States Supreme Court, Townsend. Mr. Hicks handed me this, and we have a letter from the Clerk of the Court saying they will probably decide the Townsend case sometime in October. If your Honor would like to have it, I don't think it is all-controlling. It may be contributing to the over-all issue, but if the weight that we must give to the truth serum is at issue, it was weak, look to the Townsend case, but we don't question whether it was (91) admissible or not. We question its unlawful use. We question its suppression. That is the very point we raise, as I say to your Honor we can go into it in the this court if need be, but your Honor need not do that, in accordance with the Rogers case.

I should like to leave this on the Townsend issue and the notes on the truth serum, and say to your Honor this is all we have. He says he testified to the same at the trial court. I don't know that. I have never seen or heard this truth serum, as I recall to your Honor, and I don't know if it is the same, and I am vitally interested in hearing this tape recording which he, to this very day, hasn't denied exists, nor has he denied there is a full and complete transcript of this truth serum. I am vitally interested in hearing this, and I think perhaps the Court should be, too.

Thank you.

The Court: All right. Thank you, gentlemen.

(Adjourned at 5:08 P.M.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 399

EDGAR H. SMITH, JR.,
Petitioner,

vs.

HOWARD YEAGER, WARDEN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

GUY W. CALISSI,
Bergen County Prosecutor,
Attorney for and of Counsel with Plaintiff-Respondent, The State of New Jersey,
Court House,
Hackensack, New Jersey.

HAROLD N. SPRINGSTEAD,
Assistant Prosecutor,
On the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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I

Reference to Official Reports of Opinions Delivered in the Court Below

The petitioner's reference to the opinions below is correct.

II

Counter-Statement Concerning Jurisdiction

It is submitted that the decison of the United States Court of Appeals, entered on January 2, 1968, (P25a) was in no way repugnant to the Constitution of the United States and the Court did not decide any Federal issue or question not heretofore determined by this Court or in any way contrary to the applicable decisions of this Court.

III

Counter-Questions Presented

1. Whether a post-indictment explanation by a defendant who has retained counsel that his stenographic statement was "accurate" constitutes a violation of *Massiah v. United States,* 377 U. S. 201 (1964) (assuming *arguendo* it is to be applied retroactively) where the stenographic statement could have been introduced into evidence regardless of the defendant's description of "accuracy"?

2. Whether the *Massiah* doctrine, assuming its applicability in the instant case, is to be given retrospective application to a 1957 decision where the guilt determining process was in no way affected by the alleged "admission"?

3. Whether a hearing in the Federal Courts is required on the voluntariness of a 1957 "confession" when a full hearing was held by the trial judge and retained counsel expressly rejected the opportunity for a hearing in the United States District Court?

4. Whether this Court should grant review to consider the voluntariness of a "confession" where the precise issue has been decided on numerous occasions in both State and Federal Courts and this Court has declined to hear the issue three times in the past?

Introductory Statement

Prior to stating his case, petitioner conveniently *introduces* his legal arguments by a claim that "substantial doubts have been raised as to his guilt." (Pb3). Authority for this pronouncement is based upon a magazine article which is reproduced in his appendix (P27a to P63a).

In reply to this reference of "serious public doubt", respondent asks this Court to note well the words of the New Jersey Supreme Court in their second review of the case:

> "We have re-examined the original record, as well as the earlier opinion, and find no basis whatever for withdrawing from or qualifying our determination that the evidence was devastatingly convincing of the defendant's guilt." *State* v. *Smith*, 29 N. J. 561, 575, 150 A. 2d 769 (1959).

It is respectfully submitted that a magazine article based upon self-serving inaccuracies and untruths can in no way be substituted for what occurred at trial.

Counter-Statement of the Case

A. Procedural History

Petitioner is presently incarcerated under a Death sentence imposed after his conviction for first degree murder on May 28, 1967 (T. 977-25 to 30).* His conviction was affirmed on direct appeal to the New Jersey Supreme Court on June 25, 1958. *State* v. *Smith*, 27 N. J. 433, 142 A. 2d 890 (1958). Among the numerous trial errors considered in that appeal, the court considered the propriety of the admission of petitioner's written statement into evidence.* *id.* 27 N. J. at 449-460, 142 A. 2d at 898-950. The court in disposing of the admissibility issue considered the written statement "as though its introduction had been opposed upon every conceivable legal ground." *id* at 458, 142 A. 2d at 904. Concluding that there was no error in the admission of the written statement, the court upheld that trial judge who found it to be a confession which had been voluntarily given (T. 545-1 to 10). This conclusion was reached after holding an evidentiary hearing which several witnesses, including the petitioner, testified. However, petitioner's retained counsel while conceding that the statement was voluntary (T. 532-30 to 35; T. 535-26) objected to the admission of the document on the grounds that it was not really a confession (T. 545-25 to T. 546-18).

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* T.—(refers to trial transcript).

Petitioner then moved for a new trial chiefly on the grounds of newly discovered evidence. The trial court's denial was affirmed by the New Jersey Supreme Court on May 4, 1959. *State* v. *Smith*, 29 N. J. 561, 150 A. 2d 769 (1959). The United States Supreme Court denied *certiorari* on October 19, 1959. *Smith* v. *New Jersey*, 361 U. S. 861 (1959). The points presented to the court at that time were: (1) the confession was involuntary; (2) defendant was not given a fair and impartial trial; (3) defendant was inadequately represented by counsel; (4) the trial court did not properly charge all degrees of homicide and, in particular, manslaughter; (5) defendant was not present at the hearing on the motion for a new trial. See, *United States ex rel. Smith* v. *New Jersey*, 201 F. Supp. 272, 274 (D. C. N. J. 1962). Petitioner next sought *habeas corpus* relief in the Federal District Court alleging numerous trial errors. *id.* at 272. At the hearing before District Judge Lane, petitioner was represented by his trial counsel, John E. Selser and William Richter of the New York, both of whom were retained (A121a).[*] Since most of the points raised had not been considered by the New Jersey Courts, the United States District Court only considered those previously determined under State procedure. *id.* at 275-276. Judge Lane concluded, *inter alia,* that petitioner's confession was given voluntarily. *id.* at 281.

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* At trial, petitioner's attorney considered it a statement and not confession (T.525-526). In his present brief, petitioner refers to the statement as a "Q. and A."; respondent elects to use the terms "written statement" and "stenographic statement" interchangeably.

United States Court of Appeals for the Third Circuit affirmed the District Court's denial of the Petition for *habeas corpus* on July 24, 1963. *United States ex rel. Smith* v. *New Jersey,* 322 F. 2d 810 (3rd Cir. 1963) (One judge dissenting). That Court again concluded that the confession was made voluntarily. *id.* at 816-817. The petition for rehearing before the Court, *en banc,* was denied in a five to two decision on September 9, 1963. *Certiorari* was again denied by the United States Supreme Court on February 17, 1964, *Smith* v. *New Jersey,* 376 U. S. 928 (1964) (Justice Douglas voted to grant *certiorari*).[**]

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[*] A-a (refers to petitioner's appendix submitted to the United States Court of Appeals for the Third Circuit).

[**] The issues presented to the court at that time were:

> "(1) Whether the Petitioner's rights under the Fourteenth Amendment of the United States Constitution have been violated by the admission into evidence in a State prosecution of a capital case of a confession obtained from him before he had been arraigned, after a thirteen hour and twenty minute period of prolonged, massive incommunicado interrogation, after the police had obtained more

(*Footnote continued on following page*)

Petitioner then sought Post-Conviction Relief under New Jersey Criminal Practice Rule 3:10 A-1 *et seq.* raising the issues not considered by the United States District Court as well as additional ones supplied by himself and counsel. The trial court's denial was again affirmed by the New Jersey Supreme Court on July 7, 1964, *State* v. *Smith*, 43 N. J. 67, 202 A. 2d 696 (1964).

The petition for *certiorari* was again denied by the United States Supreme Court on February 1, 1965. *Smith* v. *New Jersey,* 379 U. S. 1005 (1965) as was his petition for rehearing on March 8, 1965. *Smith* v. *New Jersey,* 380 U. S. 938 (1965). Another petition for relief was de-

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(*Footnote continued from preceding page*)

than sufficient evidence to charge him with murder and without advising him of his right to counsel and right to remain silent; (2) Whether the admission into evidence of Petitioner's confession violated his rights under the Sixth and Fourteenth Amendments of the United States Constitution where his verbal acknowledgement of the accuracy of the confession, which was all that was necessary under New Jersey to qualify it, was obtained by the police, while Petitioner was in jail and in the absence of his counsel, after Petitioner had been arraigned and indicted and after he had advised the police that his attorney had told him not to sign the confession; (3) Whether, in view of the silence of the record of Petitioner's trial as to material and essential elements of his detention and the failure of the trial court to inquire as to these elements, the United States District Court should have held a plenary hearing with regard to these circumstances before determining Petitioner's application for a writ of *habeas corpus*; (4) Whether the failure of the State trial court to hold a full preliminary hearing prior to ruling on the voluntary nature of Petitioner's confession was a violation of Petitioner's rights under the Fourteenth Amendment of the United States Constitution."

nied by the trial court on March 29, 1965; the New Jersey Supreme Court denied leave to appeal on April 13, 1965 and denied a petition for reconsideration on June 22, 1965.

Petitioner filed again for *habeas corpus* relief in the United States District Court on July 7, 1965 (A3a to A27a) raising numerous points including that the "holdings of *Escobedo, Massiah* and *Russo* must be given retroactive application." Subsequent to this Court's decision in *Johnson* v. *State of New Jersey,* 384 U. S. 719 (1966) the District Court denied retroactive aplication to any of the doctrines advanced. After a denial of application for reconsideration petitioner appealed to the United States court of appeals which affirmed on May 4, 1967 (one judge dissenting) (P1a). The petition for rehearing was denied on March 15, 1968 (one judge dissenting) (P21a).

Petitioner seeks review by this Court in his fourth petition for certiorari.

B. Petitioner's Involvement and Subsequent Detention

A fifteen year old Ramsey, New Jersey, school girl, Victoria Zielinski, was found brutally murdered in Mahwah (an adjoining town) on the morning of March 5, 1957 (T. 244-37 to T. 245-26).*

---

* The Medical Examiner testified that the girl's body showed a "total loss of brain" and "her left eye was totally destroyed and all that was left of it was the sack, collapsed in the orbit of the eye's pocket." Her "lower jaw and upper jaw had multiple fractures. Her teeth, most of them were loose in her mouth and those that were left were just hanging from the gums and there was blood of course, from the nose, which was fractured in two or three places, and bleeding from the mouth . . . She had four or five distinct small bruises, lentil size, bluish in color, around her right nipple in the areola area . . . and it appeared to this examiner as being bites, teeth bites." (T. 511-21 to 38).

During the evening of March 5, 1967 one of the petitioner's friends, Joseph Gilroy, told the Ramsey Police that he had found suspicious stains on the seat and floor of his car which he had lent to petitioner the previous evening (T. 383-10 to 34).

After inspecting Gilroy's car at about 10:45 P.M. that evening, Detective Graber and Investigator Garabedian from the Bergen County Prosecutor's Office, along with Gilroy (T. 496-4) went to petitioner's mother-in-law's home in Ridgewood (T. 419-34). At about 11:30 P.M. they picked up petitioner there and brought him to police headquarters in Mahwah (T. 419-33 to T. 420-15). Present at headquarters were Prosecutor Calissi, Assistant Prosecutor Galda, Captain DeMarco, Chief Smith of Mahwah and numerous newspaper reporters (T. 420-16 to 21).

During the general questioning—chiefly by Assistant Prosecutor Galda--Captain DeMarco noticed that petitioner's left hand was lacerated (T. 476-21 to 26). Smith stated that he hurt it while repairing a tail pipe (T. 476-28 to 30). Examination of petitioner's knees revealed lacerations, contusions and scratches (T. 476-31 to 38) which he explained had happened when he fell out of the car after becoming ill the previous night (T. 476-38 to T. 477-7). Petitioner stated that he had vomited over his pants and shoes which he was wearing (T. 424-25); that he had thrown them away and would show the officer where they were (T. 477-8 to 18). Petitioner accompanied Galda and three police officers to a place in Ramsey where he pointed out a garbage can where he had thrown away his shoes (T. 420-25; T. 477-20 to 30). After retrieving the shoes (later found to be stained with blood), the group drove to the sand pit where petitioner pointed out the area where he said he vomited (T. 423; T. 478). A large light was used by the police during the search, but nothing was developed (T. 423; T. 478). From there the group went to petitioner's trailer to obtain some clothing he had worn the night before (T. 423-35). While at the trailer, petitioner stated that the jacket he had worn the night before was at his mother-in-law's home in Ridgewood (T. 423-36 to 40) and had been recently washed (T. 424-3). They then drove to the place where petitioner said he had thrown his pants after being sick on them (T. 424-23 to 37; T. 480-10 to 21). They searched the area until about 3:00 A.M. without success (T. 434-14). On the return trip to Mahwah, they searched another area where petitioner said he had first been sick—again without success (T. 425-13 to 20).

After arriving at Mahwah Police Headquarters about 3:30 A.M. a detective went to Ridgewood to pick up petitioner's jacket (T. 425-25; T. 496-36). At headquarters there was further conversation with regard to the clothing petitioner wore on the previous night (T. 480) and there was some discussion as to the possibility of again looking for the pants (T. 481). At this time petitioner was seated in the back of the room with Gilroy and another person (T. 481-30; T. 482-16). Petitioner then advised the officers that he could explain about any blood which might be found on his shoes retrieved previously (T. 481-32 to T. 482-11). Coffee and buns were brought in for everyone including petitioner, the police and some of the other fellows also being questioned (T. 482-12 to 17).

Between 3:00 A.M. and 3:45 A.M. the officers and petitioner again went out to look for the place he vomited and where he threw his pants (T. 497-14 to 19). Petitioner assisted in the search by pointing out the area where he allegedly had thrown up (T. 280 to T. 281; T. 497-20 to 28) and where he threw his pants (T. 281-14 to 20; T. 497-40 to T. 498-10), again without success. The group then returned to headquarters, arriving there "quite late" (T. 498-33).

Around 5:00 A.M. arrangements were made to have petitioner examined by Dr. Gilady with respect to his knee injuries (T. 482-18). Accordingly, the examination was scheduled between 7:30 A.M. to 8:00 A.M. (T. 482-24). Petitioner, Detective Sinatra and Captain DeMarco then drove to the latter's home (T. 482-32). There Captain DeMarco gave Detective Sinatra some money with the instructions that he and petitioner have some breakfast prior to the visit to Dr. Gilady's office (T. 482-33 to 37). Petitioner testified that he ate two eggs and a cup of coffee (T. 452). After breakfast petitioner and Detective Sinatra returned to Captain DeMarco's home and the three drove to Dr. Gilady's office (T. 482-40); the examination was conducted at 7:55 A.M. (T. 510-12). The doctor found petitioner alert and in normal health (T. 510-37 to 40); his pulse and respiration were normal (T. 511-3).

After the examination the three went to the Prosecutor's Office (T. 483-33 to 39). There, Captain DeMarco called a photographer to take pictures of petitioner's knees and hand (T. 484-3 to 8). About this time the Prosecutor's office was informed that the pants had been found, stained with blood, as were a pair of socks in the pocket (T. 499-14; T. 601-22; T. 502-15). Fingernail scrapings and a hair sample were then taken from petitioner (T. 485-5).

After pictures of petitioner were taken, Detectives deLisle and Spahr questioned him at about 10:00 A.M. as to his activities on the night of the murder (T. 519-9 to 12). Detective deLisle asked petitioner, "What did the girl do to you?" and he responded, "She hit me." (T. 519-20 to 22). He then asked petitioner, "Where did she hit you?" and he answered, "In the face." (T. 519-23). Thereupon, petitioner started crying (T. 519-24). He asked for a drink of water and a cigarette, which were given to him (T. 519-25 to 27). Petitioner then asked to speak to a certain priest that he knew in Don Bosco High School (T. 519-29 to 30); the priest was called (T. 485-14).

Prior to the arrival of the priest and after petitioner was more composed, he told the detectives of his meeting with Victoria Zielinski (T. 518-30). About forty-five minutes later the priest arrived (T. 520-4 to 10) and conferred with petitioner for approximately a half hour (T. 751-33). Petitioner then gave the Prosecutor a full statement, stenographically recorded under oath (T. 527-29 to 35). The statement commenced at 12:50 P.M. on March 6th (T. 551-33) and was continued at the vicinity of the crime (T. 531-26 to 30). The statement was concluded at 3:45 P.M. and covered thirty-nine pages (T. 393-20). Petitioner was then brought to Mahwah for arraignment (T. 489-26), arriving there at 4:05 P.M. (T. 593-22); he was arraigned at about 7:00 P.M. that evening.

C. Post-Indictment Interview

After the written statement given by petitioner had been prepared in stenographic form, Detective deLisle visited petitioner in the Bergen County Jail on March 11, 1957, for the purpose of having him read and sign it (T. 521-7). At this time, petitioner was under indictment and had retained counsel. After reading the statement for about 35 minutes, the petitioner refused to sign it on the advice of his lawyer (T. 521-10). Detective deLisle then asked petitioner if the statement was accurate and petitioner said, "yes, it was accurate". (T. 521-17)

In addition, petitioner "commented on how accurate it was and it was amazing that the court stenographer could take down with such accuracy such a statement." (T. 521-18 to 20)

It is this conversation which petitioner now claims violates *Massiah* v. *United States,* 377 U. S. 201 (1964). It is respondent's position that the Massiah doctrine has not been violated even by today's standards, that no prejudice accrued to the petitioner, and that in no event should the Massiah doctrine be given retroactive application.

ARGUMENT

POINT I

The doctrine of *Massiah* v. *United States,* assuming *arguendo* its application to a 1957 trial, should not invalidate petitioner's conviction.

Petitioner seeks to apply the doctrine of *Massiah* v. *United States,* 377 U. S. 201 (1964) to his conversation to a Prosecutor's detective (Pb12). Subsequent to the indictment of petitioner and retention of counsel, Detective deLisle visited him in the Bergen County Jail for the purpose of having him read and sign his written statement which had just been typed from the stenographic notes (T. 521-7).

Petitioner read the statement for about thirty-five minutes but refused to sign it on the advice of his lawyer (T. 521-17). As noted above, he admitted that the statement was accurate and commented that "it was amazing that the court stenographer could take down with such accuracy such a statement." (T. 521-15) This comment as to accuracy was neither an admission of guilt nor was it a representation as to the truthfulness of the written statement. Petitioner merely stated in effect that the stenographer had accurately recorded what was in fact said.* Petitioner argues that the statement would never have been admitted into evidence at trial except for this admission of accuracy, citing *State* v. *Cleveland,* 6 N. J. 316, 327-30, 78 A. 2d 560 (1951). It is submitted that regardless of the "accuracy" comment by petitioner, the written statement would have been admissible in New Jersey in 1957 just as it would be in 1968. See *Anno.: Admissibility of Confession,* 23 A. L. R. 2d 919, 924 (1952).

In *State* v. *Bindhammer,* 44 N. J. 372, 209 A. 2d 124 (1965) the State offered a transcript of the defendant's statement at trial. Since it had not been read and signed by the defendant at the time of its taking, the trial court decided it should not be admitted into evidence based upon the holding in *State* v. *Cleveland, supra.* However, the court permitted the reporter who had transcribed the confession to testify orally from his shorthand notes in accordance with *State* v. *Rios,* 17 N. J. 572, 112 A. 2d 247 (1955). On appeal, Bindhammer claimed that the reporter "should have been compelled to testify merely from his memory and should have been permitted to refer to his shorthand notes (or his transcript thereof) only to the extent necessary to refresh his present recollection." 44 N. J. at 385.

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* Petitioner testified at trial that he never made any reference to the accuracy of his written statement to Detective deLisle (T. 675-5). However, his affidavit of March 22, 1965 stated, "I did make some representations as to the 'confession's accuracy' " (A50a).

The Court in rejecting the contention advised:

> "Documents may, of course, freely be referred to for the purpose of refreshing or reviving present recollection. See *Zimmer* v. *Westinghouse Electric Corp.*, 26 N. J. 339, 350-351 (1958). Where the recollection was recorded at the time of the event, or when it was fairly fresh in mind (McCormick, Evidence, § 277, at p. 591 (1954) its record will generally be more accurate and trustworthy than present recollection of "greater or less vividness." 3 *Wigmore, Evidence,* § 738, at p. 76 (3d ed. 1940). If the circumstances are appropriate, the *record may become a competent witness within the evidential doctrine referred to as 'past recollection recorded,' a doctrine long recognized in our State as well as elsewhere.* See *Kazanjian* v. *Atlas Novelty Co.*, 34 N. J. Super. 362, 369-372 (App. Div. 1955)." (Emphasis added.) 44 N. J. at 385-386, 209 A. 2d at 131.

Thus, the New Jersey Supreme Court has clearly announced what the law is with regard to receiving documents in evidence on the basis of "past recollection recorded". Therefore, regardless of petitioner's "admission of accuracy", his written statement could have been admitted at trial in 1957.

In addition, the "admission of accuracy" did not constitute a representation that his statement was truthful. Therefore, no prejudice could have accrued to the petitioner at trial.

POINT II

Assuming *arguendo* the factual applicability of *Massiah v. United States,* that doctrine should not be applied retroactively to a 1957 conviction.

Assuming, *arguendo,* that the actions of Detective deLisle in bringing petitioner's statement to him after the indictment and retention of counsel would in some way be violative of the *Massiah* doctrine, there is no reason for this Court to set aside petitioner's 1957 conviction.

Petitioner's theory that *Massiah* should be given retroactive application is based principally upon *McLeod* v. *Ohio,* 381 U. S. 356 (1965). That case, however, was a direct appeal and not a collateral attack upon a 1957 conviction. It is submitted that the proper disposition of the issue was accorded in *Romano* v. *Fay,* 360 F. 2d 389 (Cir. 1966). In that case, the precise issue was whether the use of post-indictment statements made to a police officer required reversal of his 1953 conviction, and the Court properly held:

> ". . . the only infirmity in Romano's questioning and subsequent trial was an inconsistency with two Supreme Court decisions handed down more than ten years later, *Massiah* v. *United States,* 377 U. S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), and *Escobedo* v. *State of Illinois,* 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 977 (1964), and that those decisions should not be retrospectively applied to void Romano's conviction." 360 F. 2d at 391.

The Court considered the underlying reasons for the *Escobedo* and *Massiah* doctrines stating:

> "In our opinion, the most important factor in our decision is an assessment of the purposes of

> the *Escobedo* and *Massiah* doctrines and the effect of retroactive application upon the achievement of those purposes. In assessing the 'complex of values' underlying these decisions, the inquiry must be focused on whether the new doctrine was aimed at correcting influences that 'infect a criminal proceeding with the clear danger of convicting the innocent.' *Tehan* v. *United States ex rel. Shott,* 383 U. S. 406, 86 S. Ct. 459." *id.* at 394.

The Court distinguished the evils inherent in the use of coerced confessions from *Massiah*:

> "But these same dangers are not present when the defendant is questioned by the police. To be sure, the defendant is often at a tactical disadvantage in the 'battle of wits' between a skilled interrogator and one who attempts to obscure or conceal his guilt. But the confessions or admissions that are obtained through normal and noncoercive police questioning are not unreliable and the search for truth is not hampered by their admission during a trial at which the defendant is represented by counsel. Thus, we find the Sixth Amendment arguments for retroactive application of the *Massiah* and *Escobedo* far weaker than the arguments which led us to apply *Gideon* retroactively." *id.* at 395.

In considering the retroactive application of *Massiah* to a 1961 conviction, the Court of Appeals in *Lyles* v. *Beto,* 363 F. 2d 503 (5th Cir. 1966) advised:

> "We have reconsidered this case in light of *Massiah* and in light of *Malloy* v. *Hogan,* 378 U. S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653. We conclude that

> the opinion of the Supreme Court in *Johnson and Cassidy, Petitioners* v. *State of New Jersey,* 1966, 834 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882, rules this case. The trial in this case began long before June 13, 1966, the cut off date now announced by the Supreme Court for the application of the requirement of *Miranda* v. *Arizona,* 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694." *id.* at 503-504.

It is submitted that the same reasons for denying retroactivity to the exclusionary rule announced in *Mapp* v. *Ohio,* 367 U. S. 643 (1961) by *Linkletter* v. *Walker,* 381 U. S. 618 (1965) should apply to the *Massiah* doctrine as well. In *Linkletter,* this Court advised:

> ". . . there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of Mapp retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. *To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice.* *id.* 381 U. S. at 637, 638. (emphasis added.)"

This Court further noted in cases where the decisions applied retrospectively (*e.g. Gideon* v. *Wainwright,* 372 U. S. 335 (1963)) that:

> ". . . in each of the three areas in which we have applied our rule retrospectively the principle that

> we applied went to the fairness of the trial—the very integrity of the fact-finding process." *Linkletter* v. *Walker, supra,* 381 U. S. at 639.

It is submitted that the guilt determining process was in no way affected in the instant case and therefore retroactive affect to the *Massiah* doctrine should be denied. See *Johnson* v. *New Jersey,* 384 U. S. 719 (1966).

POINT III

Voluntariness of petitioner's statement was determined in the trial court and an adequate record was presented for both State and Federal court review.

Petitioner's retained counsel conceded at trial that his statement given to the officials of the Bergen County Prosecutor's Office was voluntary (T. 532-30 to 35; T. 535-36). However, since he objected to its introduction into evidence on other grounds, the trial court took testimony on the issue of voluntariness (T. 537-27). Petitioner now seeks a hearing based upon *Townsend* v. *Sain,* 372 U. S. 293 (1963) (Pb18) to question the voluntariness of his statement after relying upon the record developed by the trial court. On May 15, 1961, District Court Judge Lane asked petitioner's retained counsel if the record, which was before him for the first time, was deficient in any respect.

> ". . . I think I initiated the idea that I didn't want counsel on the side of the defendant or the side of the State or anybody involved in this case feeling dissatisfied with the state of the record; that I wanted this record insofar as you gentlemen are concerned to be as complete as you thought it should

> be. . . . I am not talking about the merits. I just wanted everybody to be satisfied that they had, so far as they were concerned, the record in complete form so that here and later and wherever you may go, whoever takes the initiative of going from here to somewhere else would not be called upon to argue that this is incomplete and this matter really hasn't been heard as yet." (A122a to A123a)

Petitioner's retained counsel rejected the offer of Judge Lane and argued the issue of voluntariness based upon the record (A129a to A149a). In fact, counsel stated that:

> "The United States Supreme Court says your Honor may hold a hearing de novo if need be to go into the historical facts behind the case. *I don't think it is necessary here.*
>
> *"I think if your Honor limits himself to the record. . . ."* (A130a) (Emphasis added.)

Petitioner claims that despite the above that he did not waive his right to a hearing and cannot be bound by the actions of his counsel because it was not his considered choice (Pb23). It should be noted that a hearing is discretionary and that petitioner has no inherent right to a plenary evidentiary hearing. Here he retained competent counsel to represent him and must be bound by their actions. Could petitioner insist on being present at any and all oral arguments of his numerous appeals? Should he not be bound by this very petition which is submitted to this Court? It is submitted that any such notion that he must expressly waive any legal points or arguments which he feels should be submitted to a court after an adverse decision would be an impossible imposition upon orderly legal process in the United States.

It is submitted that a full hearing on the voluntariness of petitioner's statement was afforded to him in the trial court, rejected in the Federal District Court, and should be denied to him by this Court.

POINT IV

The issue of voluntariness has been properly decided in both State and Federal courts and this Court should again refuse review of the issue.

The issue of voluntariness of petitioner's written statement has been justly and fairly determined in both Federal and State Courts. Indeed, this Court has refused to review the issue three times previously. Petitioner raises the issue in two areas of his petition. The first is in his "statement of the case" where, unencumbered by references to the record, he claims that "through the night and morning, there followed more than thirteen hours of interrogation and other police strategies designed to elicit the Q. and A. statement." (Pb4-5). The facts show that petitioner was first interviewed at 11:30 p.m. on March 5th (T. 419-420) and at about 10 a.m. on the morning of March 6th admitted hitting the victim (T. 519). At that time he started crying (T. 519-24) and asked to speak to a priest he knew from Don Bosco High School. Thus, some 10½ hours after the first interview with petitioner a priest was summoned at his request. Was his one-half hour conference with his priest (T. 751-33), one of the "police strategies designed to obtain the Q. and A. statement"?

Petitioner in a modified version of a chart prepared by the *Defender Newsletter,* Vol. II, No. 5 (1965) seeks to fall within the ambit of those cases by showing similarities. It is submitted that the facts shown by the record and petitioner's use of the chart are irreconcilable.

Contrary to this picture of "involuntariness" related by petitioner, the record shows that he (1) was alert and had sufficient rest; (2) had sufficient food; (3) wasn't continually questioned or harassed; (4) that no promise or threats were made to him by the police or prosecutors.

Initially it should be noted that when petitioner committed the crime he was 23 years old, had a wife and daughter, and was formerly a member of the United States Marines (T. 775-T. 776). The first time the matter was before the United States Court of Appeals that Court considered the contention that petitioner suffered from a lack of sleep.

> "The night of the murder, he was in bed by 10:00 P.M. He listened to four rounds of the Gil Turner-Ruby Given prize fight. He said, 'I laid in bed listening to Gil Turner knock him out in the fourth round and went to sleep.' A round is of three minutes duration with one minute rest intervals. Three rounds and part of a fourth would not total fifteen minutes. The fight would take a few minutes to get under way. Reasonably it was over before 10:30 P.M. He got out of bed the next morning '* * * about 8:30.' So he had apparently an excellent night's rest. The next evening he was in bed by seven o'clock. He rose a half hour later and took his wife and baby to his mother-in-law's. He went to bed there and was in bed for two hours before the police woke him at 11:30 P.M. From that time through his arraignment there is nothing to indicate in Smith any condition of exhaustion or fatigue." 322 F. 2d at 813.

In addition, there was testimony that petitioner was "all right in every way" (T. 543-37); "in good shape"; "his mind seemed to be clear", and "he seemed to be wide awake." (T. 517-5 to 7).

As to petitioner's claim of having insufficient food* the Court of Appeals concluded:

> "Somewhere around 3:00 A.M. when clearly for the first time anyone concerned was having something to eat and drink, i.e., buns and coffee, Smith was included. He had more coffee after that. And about 7:30 that morning or earlier he had his breakfast. . . . It is not contradicted that before starting his statement Smith was asked if he wanted '* * * some coffee or anything?' He asked for coffee and the answer was 'Surely'; that when he was more than half way through his statement he was asked 'Would you like some more coffee or *anything?*' (Emphasis supplied), which offer he did not accept; that a little while after that he was again asked 'would you like some coffee and rest for a few minutes—*something to eat?*' (Emphasis supplied) The offer of coffee and food was not accepted but that of a rest was and a short recess was taken. Right after the arraignment, Smith went to restaurant with the Prosecutor where they had something to eat. Smith said 'After I ate I felt fine'." 322 F. 2d at 814.

Petitioner's contention that he was interrogated in relays of police officials during the 13 hour period prior to giving his statement (Pb5) is without foundation in the record. He admitted that Mr. Galda questioned him at about midnight and then "on and off, not continually." (T. 540-34). Most of the time was spent not in questioning petitioner but in searching for his shoes and pants and the places he supposedly vomited (T. 541-20); waiting with others who were being questioned (T. 481-30; T. 482-16); eating (T. 482-12 to 17; T. 482-33 to 37); being examined by Dr. Gilady (T. 510-40); having pictures taken of his knees and hand (T. 484-3 to 8); and speaking to a priest that he requested (T. 751-18 to 30).

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* Petitioner claims that during a 35 hour period he had only two eggs and cups of coffee. At trial he stated: "The only thing I had eaten for a period of, I would say, almost twenty-four hours was two eggs, a cup of coffee in the diner and a container of coffee in Mahwah and another container in the Prosecutor's Office." (T542-6 to 11). Compare this with his affidavit (A100a-11) and brief in the Court of Appeals (Ab11; Ab12). See also statement by counsel (T489-37).

Petitioner's other complaint, made at the hearing on the voluntariness of his confession was that he "had been cold all night". (T. 542-7). Presumably this reference is to the two to three hour period which he stated was the total time that he spent outdoors (T. 541-17 to 22). The Court of Appeals, in reviewing the record supporting the contention, advised:

> "Some mention is made of Smith not having an outside jacket on while he was going with the police to the various places connected with his story. He was out of doors altogether at most two or three hours. The longest he was out at one time was an hour. He wore a red woolen shirt. He had an undershirt on, for later he took it off and it was marked for identification. At one stage outdoors he mentioned it was quite cold and Mr. Galda gave him his overcoat which he wore from one-half to three-quarters of an hour. The next morning, before he was taken to breakfast and to the doctor's, because he was cold, he was allowed to move into the front seat of the automobile in which he rode, as he says '* * * so that he (Detective Sinatra) could turn the heater on for me * * *.' There

> is evidence indicating that the weather the night of March 5th was only two degrees colder than that of the night of March 4th. And while there is testimony that he had worn a blue jacket on the 4th, Smith also definitely said that all he had on that night was a shirt." 322 F. 2d at 814.

The Court then noted the following questions and answers during petitioner's cross-examination when he described the clothing Hommel was wearing the night of the murder:

> "Q. Well, it was pretty cold that night? A. It was.
>
> "Q. And all he had on was a shirt? A. *That is all that I had on.*"
>
> * * *
>
> "Q. Just a shirt? And it was a cold night though, wasn't it? A. *I didn't think it was too cold.*" (T. 783-32 to 40) (Emphasis added.)

Such cases as *Haley* v. *Ohio,* 332 U. S. 596 (1948), and *Spano* v. *New York,* 60 U. S. 315 (1965), are clearly distinguishable on their facts. In *Haley* the defendant was a 15-year old boy who was questioned in relays of police from midnight until 5:00 A.M. The certain coercive effect of that much interrogation at night upon a 15-year old boy, who would be more susceptible to pressures than an adult, was held sufficient to make his confession involuntary. In *Spano,* the subject had a history of emotional instability and was "grilled" for more than 8 hours. In holding the confession was not voluntary, the Court emphasized the inevitable effect of fatigue and the psychological coercion from a police friend of his who falsely played upon his sympathies.

Certainly, there can be no claim that petitioner was a child as in *Gallegos* v. *Colorado,* 370 U. S. 49 (1962), and *Haley* v. *Ohio, supra,* or an adult with the mental age of a child as in *Columbe* v. *Connecticut,* 367 U. S. 568 (1961). Quite the opposite is true—petitioner was a 23 year old former Marine; married and quite intelligent. The only person he ever requested to see was a priest who was called and spent a considerable time with him. He was never denied counsel and never even handcuffed (T. 774-19 to 28).

Petitioner's "confession" itself shows the voluntary nature in which it was given. He was introduced to those present (T. 1073-11) and was asked if he would give a voluntary statement under oath (T. 1073-15 to 30); he was asked if he cared for "coffee or anything" (T. 1073-28). The questioning was mostly in the narration form and at the outset he asked:

> "A. . . . Can I ask a question here?
>
> Q. Surely. A. Like I explained to you before I am a little fuzzy on this. As I go along, can I add on—
>
> Q. Certainly, just as you know the incident as it actually occurred—and you can interrupt at any time you want. A. That's what I want to do—interrupt." (T. 1073-36)

During the questioning, no pressure was exerted upon him. (See T. 1079-12; T. 1088-8; T. 1089-8; T. 1092-25; T. 1097-13) and a recess was taken when he asked to go to the men's room (T. 1086-40 to T. 1087-10). Coffee was offered to him twice (T. 1097-18; T. 1099-29) and milk was sent for when he requested it (T. 1099-36 to T. 1100-4).

Petitioner who now claims his "confession" was the result of an overborne mind caused by the physical and mental pressures exerted stated the exact opposite during the course of the statement:

> "Q. What we are going to do now, on the places you indicated to us, we are going to go to the area. It will be with the same people in this room and we are going in two cars and you can point out these things you mentioned on the spot. Is that agreeable to you? A. Yes.
>
> Q. And while you were in the custody of the policemen and up at the Mahwah Police Headquarters, did anybody mistreat you or anything? A. No, sir.
>
> Q. *Everybody treat you all right?* A. *Better than I expected.*
>
> Q. I beg your pardon ? A. Better than expected.
>
> Q. Very well. It's nice to hear." (T. 1100-13 to 25) (Emphasis added.)

In his brief to the United States Court of Appeals, petitioner submitted an affidavit by his former wife. Therein, she stated that she never called an attorney since she didn't think it was necessary (A79-14 to 17). In addition, she never recalled being asked by petitioner to get a lawyer (A70a-22 to 26); did not recall anyone telling her that petitioner didn't need an attorney (A80a-38 to A81a-2); and she did not remember petitioner being ill prior to being interviewed by the police (A82a-10 to 13).

The instant case should be distinguished from *Davis* v. *North Carolina,* 384 U. S. 737 (1966). There, *Davis* was incarcerated for sixteen days on another charge and continuously questioned with regard to a murder. The poor food, the constant questioning, his claimed request and denial of counsel, a notation by police that no one was allowed to see him, his being an impoverished negro with a third or fourth grade education and the use of a prayer by the interrogator were some of the factors comprising the "totality of circumstances" showing the involuntariness of his confession. The facts, as disclosed by the trial transcript do not bear the slightest resemblance to *Davis* v. *North Carolina, supra.* It is submitted that there is not the slightest indication that the petitioner's admission, based on the "totality of the circumstances" was coerced. Indeed, the record shows that it was the product of his own free will.

Petitioner relies principally upon *Greenwald* v. *Wisconsin,* 390 U. S. 519 (1968). In that case Greenwald, who had a ninth grade education, was suffering from high blood pressure and had been under medication for the condition at the time of his arrest shortly before 10:45 P.M. on January 20, 1965. He had last taken food and medication at 4 P.M. the same day. At police headquarters he was questioned until midnight and was not advised of his constitutional rights. He was booked and fingerprinted at 2 A.M. and taken to a cell in the city jail and he was unable to sleep because he was only given a "plank" on which to sleep. The following morning (8:30 A.M.) he was placed in a line-up and his interrogation started again at 8:45 A.M. without the benefit of breakfast, his medication or food of any kind. He refused to answer questions and when he spoke it was only to deny his guilt. After 10 A.M., the police asked Greenwald to write out a confession but he refused and requested a lawyer. The police ignored his request and at about 11 A.M. he made a series of oral admissions resulting in a full confession at 11:30 A.M. Greenwald confessed because he knew the police "weren't going to leave me alone until I did." *id.* at 517.

This Court examined the *record* in order to determine whether Greenwald's confession was voluntary. In concluding that the confession was involuntary this Court advised, "We reach this decision . . . without reference to disputed testimony taken at the pre-trial hearing." *id.* at 518.

The present case bears little resemblance to *Greenwald.* Here, petitioner was not under medication, had eaten and did not request a lawyer. Rather, petitioner was affirmatively assisting the police. The police checked out his version—a process which could just as easily have exculpated petitioner.

It is respectfully submitted that the issue of the voluntariness of petitioner's statement has been properly adjudicated by all of the courts of review.

CONCLUSION

For the reasons hereinbefore set forth, it is respectfully urged that the Petition for Certiorari be denied.

Respectfully submitted,

Guy W. Calissi,
Bergen County Prosecutor,
Attorney for and of Counsel with Plaintiff-Respondent, The State of New Jersey, and Howard Yeager, Warden.

Harold N. Springstead,
Assistant Prosecutor,
On the Brief.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 399

EDGAR H. SMITH, JR., *Petitioner*,

v.

HOWARD YEAGER, WARDEN, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF OF PETITIONER

The State of New Jersey fails to rebut *with reasons* each of the three arguments presented.

QUESTION ONE—*Massiah's* Retroactivity

The State insists that the post-indictment admission it deceptively elicited from petitioner was no more than an acknowledgment that the stenographer had been "accurate" in transcribing the prior confession. But that ignores *the use* made of the "accuracy" admission at trial. Since the jury was permitted to consider the "accuracy" statement in assessing the "weight and credibility" of the prior confession (T. 963, Pet. 7, 13), the statement was *used* against Smith, not merely to show that he had verified the transcription, but to prove that he had reconfirmed the truth-content of the confession. In short, it was used as a second confession.[1]

Assuming that view of the "accuracy" admission, the State does not dispute that *Massiah* was violated, but contests only its application on retroactive collateral attack. It implicitly acknowledges that this Court, in *McLeod* v. *Ohio,* 381 U.S. 356 (1965) has already distinguished *Massiah* from *Escobedo* and *Miranda* by applying *Massiah* to pending appeals.[2]

But the State offers not a single reason for denying full retroactivity. Although New Jersey repeats, in abstract terms, the *Linkletter* categories to be considered, it fails to analyze the applicability of the categories to *Massiah* in particular. For example, with respect to the impact of retroactivity on the "administration of justice", it does not rebut that post-indictment interrogations are rare, and that less than ten reported cases have presented retroactive *Massiah* violations. (Pet. 16-17). And in a case in which a comment on the "accuracy" of a transcription was twisted for use at trial as a second confession, the State would have this Court believe that "the very integrity of the fact-finding process" *Linkletter* v. *Walker,* 381 U.S. 618, 639 (1965) was left unaffected!

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[1] Likewise beside the point is the State's argument that the first confession might have been admissible without the later "accuracy" admission. The point is not what "accuracy" might have meant, or how the first confession might have been admitted, but how the "accuracy" statement was, in fact, used at trial.

[2] The State's only lower court citations, *Romano* v. *Fay,* 360 F.2d 389 (2d Cir. 1966) and *Lyles* v. *Beto,* 363 F.2d 503 (5th Cir. 1966) are therefore unavailing since neither opinion acknowledged even the existence of *McLeod,* and *Romano* "does not involve a confession." 360 F.2d at 398.

Notably, this Court has re-emphasized again this Term, for retroactivity purposes, the "distinction drawn between the right to counsel cases [e.g., *Massiah*] and those arising under the Fourth and Fifth Amendments . . . ." [e.g., *Miranda*]. *Arsenault* v. *Massachusetts* No. 187 Misc., decided October 14, 1968.

QUESTION TWO—The "Waiver" of a *Townsend* Hearing

In 1961, prior to the development in *Townsend* v. *Sain*, 372 U.S. 293 (1963) of the right to a habeas hearing,[3] petitioner's first habeas court and his counsel made comments that allegedly constituted a "waiver" of that right. The State's response here, however, does not dispute:

1. That the expanded "right to a hearing" was then unknown. (Pet. 18).

2. That the alleged "waiver" remarks of court and counsel were made three weeks apart from each other. (Pet. 19).

3. That the habeas judge never explicitly offered a hearing, but instead was expressing concern for "the state of the record" in terms of the completeness of the papers filed. (Pet. 19-20).

4. That petitioner's present habeas petition states allegations in a degree of detail that would have been unavailing prior to *Townsend.*

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[3] Apparently, New Jersey is still under the impression that habeas hearings are entirely discretionary (Br. in Opp. 19), despite *Townsend's* "mandatory" categories.

5. That the "voluntariness hearing" conducted at trial was conducted unconstitutionally in the presence of the jury, (*Sims* v. *Georgia*, 385 U.S. 538 (1967)), by inadequately prepared trial counsel who was belated in his attack on voluntariness and then virtually failed to conduct any cross-examination. (Pet. 24-25).

6. That petitioner never personally consented to the alleged "waiver". (Pet. 23).

These undisputed facts are utterly inconsistent with this Court's teachings on the validity of a "waiver". *Johnson* v. *Zerbst,* 304 U.S. 458, 464-66 (1938); *Fay* v. *Noia*, 372 U.S. 391 (1963).

Question Three—Involuntariness on the Existing State Court Record

The State attempts to distinguish *Greenwald* v. *Wisconsin,* 390 U.S. 519 (1968) by noting:

1. Greenwald was taking medication but had none during his detention. But Greenwald

> "himself testified that at no time between his arrest and his confession did he express to anyone a desire for food or medication." 390 U.S. at 522.

Moreover, Smith too was ill (T. 541) and consequently could eat only two eggs and cups of coffee during the 35 sleepless hours that culminated in his 13 hour night long detention.

2. Greenwald, interrogated after *Escobedo,* requested a lawyer. But unlike petitioner Smith, he was "by no means a stranger to the criminal law". 390 U.S. at 521. Moreover, petitioner has consistently alleged a request in his *pro se* habeas applications even before *Escobedo* highlighted its legal significance. (Pet. 22, Pet. App. 152). The State, however, has never responded to this or any other of Smith's habeas allega-

tions. In all the years of litigation, it has done no more than baldly oppose an evidentiary hearing. Its assertion that there was no request is therefore ironically typical of its characterization of what "the record shows"[4] (Br. in Opp. 21, 28).

This Court need not order an evidentiary hearing, however, for New Jersey does not and cannot rebut that in virtually every relevant detail *Greenwald* and *Smith* are as much on all fours as two cases are ever likely to be:

	Greenwald	*Smith*
Time of arrest	10:45 p.m.	11:30 p.m.
Total detention prior to confession	12¾ hrs.	13 hrs.
Physical condition	Taking medicine	Ill and cold
Warnings	None	None
Sleepless hours	At least 13	35 (in bed for two hrs. prior to arrest)
Last meal	4:00 p.m., prior to arrest	Morning before arrest
Detention food	None	2 eggs an cups of coffee
Promises or threats	None	Disputed
Number of Interrogators	"Several at a time"	More than 12
Early morning detention events	Line-up	Doctor's exam, hair & nail sample taken

Moreover, the State also ignores the features of Smith's interrogation that made it even more coercive than Greenwald's:

1. Greenwald was left alone to sleep from 2 a.m. until the morning. Petitioner Smith was taken from

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[4] Likewise the record does not show that petitioner "(1) was alert and had sufficient rest; (2) had sufficient food; (3) wasn't continually questioned or harassed; (4) that no promise or threats were made to him by the police or prosecutors". (Br. in Opp. 21). The record plainly refutes the first three of these assertions and the fourth is the subject of another habeas allegation that the State has consistently refused to test in any court.

place to place and questioned from time to time throughout the night by different teams of officials.

2. Greenwald, but not Smith, testified that he was fully aware of his rights to silence and counsel.

3. In Smith's case, hours prior to the confession, the most damaging evidence against him, more than ample for arraignment, had already been obtained. (Pet. 6).

Finally, petitioner's case, although well within the *Greenwald* holding, does not necessarily rest upon that alone. (See chart, Pet. 26). The State responds to petitioner's comparison chart only by isolating single factors present in certain of this Court's cases that are not present here. Petitioner does not contend that his case is fully congruent with each of the cases presented in the chart. His was, however, an interrogation in which the "totality of the circumstances", see *Clewis* v. *Texas*, 386 U.S. 707 (1967) manifests an overreaching no less coercive than those that have compelled this Court to reverse in the past.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
STEVEN M. UMIN
1000 Hill Building
Washington, D. C. 20006
Attorneys for Petitioner

Of Counsel:

STEPHEN F. LICHTENSTEIN
505 Broad Street Bank
Building
Trenton, New Jersey

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

SMITH *v.* YEAGER, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 399. Decided November 12, 1968.

PER CURIAM.

This petition for a writ of certiorari presents the question whether petitioner's relinquishment of an evidentiary hearing in a federal habeas corpus proceeding taking place prior to *Townsend* v. *Sain,* 372 U. S. 293, bars him from obtaining such a hearing on a subsequent application made after *Townsend* was decided.

In 1957, petitioner was convicted of first degree murder in a New Jersey court, and sentenced to death. The Supreme Court of New Jersey affirmed the conviction, *Smith* v. *State,* 27 N. J. 433, 142 A. 2d 890, and subsequently affirmed the denial of a motion for a new trial. *Smith* v. *State,* 29 N. J. 561, 150 A. 2d 769.

Petitioner thereafter sought a writ of habeas corpus in the United States District Court for the District of New Jersey. During oral argument before the District Court on June 5, 1961, petitioner's counsel, referring to the then recent decision in *Rogers* v. *Richmond,* 365 U. S. 534, stated:

> "The United States Supreme Court says your Honor may hold a hearing de novo if need be to go into the historical facts behind this case. I don't think it is necessary here.
>
> "I think if your Honor limits himself to the record, I think that the error, the fundamental constitutional error in this case is so overwhelming that I need not stand here and argue this case at any great length." Petition Appendix, p. 69a.

The District Court did not conduct an evidentiary hearing. Relying on the state trial record, it denied the application, holding, *inter alia,* that petitioner's confession, introduced at his trial, was not the product of coercion. *United States ex rel. Smith* v. *New Jersey,* 201 F. Supp. 272. The Court of Appeals affirmed. 322 F. 2d 810.[1]

In 1965, petitioner again sought habeas corpus in the District Court, requesting an evidentiary hearing. As supplemented, the application alleged facts relevant to the admissibility of the confession which were not brought out at trial, and which, if proved, presented a stronger case that the confession was coerced.[2] The District Court denied the application without conducting an evidentiary hearing, noting that the issue of coercion had been adjudicated in the prior habeas proceeding. The Court of Appeals affirmed, *per curiam,* Judge Biggs dissenting. Referring to the above-quoted statement by petitioner's counsel, and to some remarks of the District Court at an earlier stage of the 1961 proceeding,[3] the

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[1] Petitioner has sought, and was denied, certiorari in this Court on three previous occasions—twice to the state courts, 361 U. S. 861; 379 U. S. 1005, once to the United States Court of Appeals in the prior habeas corpus proceeding, 376 U. S. 928. It is worth noting that the present pleadings below substantially expand and clarify the claims heretofore presented by petitioner.

[2] The allegations, which include claims of physical harassment by the police, are set out in Judge Biggs' dissenting opinion below, 395 F. 2d 245, 253, n. 12.

[3] On May 15, 1961, during argument on the State's motion to strike petitioner's "Amended and/or Supplemental Petition," the District Court indicated its concern that the record be complete to the satisfaction of both parties. The Court of Appeals construed this as an offer to conduct an evidentiary hearing. No explicit mention of an evidentiary hearing was made, however. A reading of the entire colloquy in the District Court, though not unambiguous, suggests, as Judge Biggs noted in dissent below, that the discussion was concerned only with "the issue of whether or not the case would proceed upon the original petition for habeas corpus and answer, the supplemental petition for habeas corpus and answer, or on both sets of pleadings." 395 F. 2d 245, 249, n. 4.

Court of Appeals concluded that petitioner had waived his claim to an evidentiary hearing in 1961. 295 F. 2d 245. Rehearing *en banc* was denied, Judge Freedman dissenting,[4] and this petition for certiorari followed.

We note initially that the usual principles of *res judicata* are inapplicable to successive habeas corpus proceedings.[5] *Salinger* v. *Loisel,* 265 U. S. 224; cf. *Sanders* v. *United States,* 373 U. S. 1. Whatever the standards for waiver may be in other circumstances, the essential question here is whether the petitioner "deliberately withheld the newly asserted ground" in the prior proceeding, or "otherwise abused the writ." 28 U. S. C. § 2244 (b).

At the time of the 1961 proceeding, *Brown* v. *Allen,* 344 U. S. 443, indicated that a District Court's discretion to hold an evidentiary hearing was to be exercised only in "unusual circumstances," 344 U. S., at 463, or where a "vital flaw" existed in the state procedure. 344 U. S., at 506 (opinion of Mr. Justice Frankfurter). *Townsend* v. *Sain, supra,* had not yet been decided. This Court recognized in *Townsend* "that the opinions in *Brown* v. *Allen* . . . do not provide answers for all aspects of the hearing problem for the lower federal courts, which have reached widely divergent, in fact often irreconcilable, results," 372 U. S., at 310, and established criteria for the granting of evidentiary hearings "which must be considered to supercede, to the extent of any inconsistencies, the opinions in *Brown* v. *Allen* . . . ." 372 U. S., at 312. *Townsend* v. *Sain* substantially increased the availability of evidentiary hearings in habeas corpus proceedings, and made mandatory much of what had previously been within the broad discretion of the District Court. See also *Fay* v. *Noia,* 372 U. S. 391.

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[4] Judge Biggs did not participate.

[5] For this reason, if no other, the fact that *Townsend* v. *Sain* was decided before the Court of Appeals' decision in the first proceeding, and considered by the Court of Appeals there in denying rehearing *en banc,* is not dispositive of the present case.

It is at least doubtful whether petitioner could have obtained an evidentiary hearing as the law stood in 1961. Indeed, at the time, the State argued to the District Court with some cogency that petitioner presented "no unusual circumstances calling for a hearing." We do not believe that petitioner should be placed in a worse position because his then counsel asserted that he had a right to an evidentiary hearing and then relinquished it. Whatever counsel's reasons for this obscure gesture of *noblesse oblige*,[6] we cannot now examine the state of his mind, or presume that he intentionally relinquished a known right or privilege, *Johnson* v. *Zerbst,* 304 U. S. 458, 464, when the right or privilege was of doubtful existence at the time of the supposed waiver. In short, we conclude that petitioner's failure to demand an evidentiary hearing in 1961, followed by such a demand after the decision in *Townsend* v. *Sain, supra,* constitutes no abuse of the writ of habeas corpus.

"If, for any reason not attributable to the inexcusable neglect of petitioner . . . evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled." *Townsend* v. *Sain, supra,* at 317. Petitioner's assertion that he comes within this principle is not controverted by respondent or by the record below. We do not, however, pass on this question, or on the other questions presented in the petition. These, as well as other issues appropriately raised below, may be considered by the District Court. We hold only that petitioner has not, by reason of anything that occurred during the 1961 habeas proceeding, waived his claim to an evidentiary hearing in the District Court.

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[6] As the State pointed out during the 1961 hearing, *Rogers* v. *Richmond, supra,* the case chiefly relied on by petitioner, does not appear to support his claim to an evidentiary hearing. See especially 365 U. S., at 547.

The petition for writ of certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for proceedings consistent with this opinion.

It is so ordered.

Mr. Justice White dissents and would grant certiorari and set the case for oral argument.